(1)

No. 88-6025-CFY
Status: GRANTED

Title: Reuben Dowling, Petitioner
v.
United States

Docketed:
November 28, 1988

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Tucker,Robert L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 28 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 5 1989		Order extending time to file response to petition until February 2, 1989.
5	Feb 2 1989		Brief of respondent United States in opposition filed.
6	Feb 9 1989		DISTRIBUTED. February 24, 1989
8	Feb 27 1989		Petition GRANTED.
			**********
10	Apr 7 1989		Order extending time to file brief of petitioner on the merits until April 29, 1989.
11	Apr 7 1989		Brief amicus curiae of National Assn.of Criminal Defense Lawyers filed.
12	Apr 12 1989		Joint appendix filed.
13	Apr 26 1989		Record filed.
		*	2 vol.
14	Apr 29 1989		Brief of petitioner Reuben Dowling filed.
15	May 5 1989		Record filed.
		*	7 vol reced. from USDC VI
16	Jun 5 1989		Brief of respondents United States, et al. filed.
17	Jun 28 1989		Reply brief of petitioner Reuben Dowling filed.
18	Jul 13 1989		CIRCULATED.
19	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 4, 1989. (3RD CASE)
20	Oct 4 1989		ARGUED.

88-6025

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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19 pp

QUESTION PRESENTED

In a federal criminal trial does either the due process or double jeopardy clause of the Fifth Amendment bar the introduction of evidence concerning prior unrelated criminal conduct for which a defendant has been previously tried and acquitted, and, if so, did the Court of Appeals erroneously utilize the statutory harmless error standard rather than the more stringent standard required by Chapman v. California, 386 U.S. 18 (1987), after determining that such evidence had been erroneously admitted.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Reuben Dowling petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

PARTIES TO THE PROCEEDING

The caption of the case provides the names of all parties to the proceeding.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 855 F.2d 114 (3d Cir. 1988), and appears herein as Appendix A. The order of the Third Circuit denying petitioner's Petition to Rehear and Suggestion for Rehearing En Banc appears herein as Appendix B.

JURISDICTION

The opinion of the Third Circuit was filed on August 22, 1988. The order denying the Petition to Rehear and Suggestion for Rehearing En Banc was filed on September 28, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the Fifth Amendment to the United States Constitution provides in relevant part that:

> [No person shall] be deprived of life, liberty, or property, without due process of law;

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

18 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52(a), Federal Rules of Criminal Procedure, provides:

> Rule 52. Harmless Error and Plain Error:
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

The petitioner was tried in the District Court of the Virgin Islands for bank robbery and related offenses, stemming from

the robbery of the First Pennsylvania Bank in Frederiksted, St. Croix, United States Virgin Islands on July 8, 1985. [1]

Petitioner's first trial ended in a hung jury. At his second trial petitioner was convicted of various offenses relating to the bank robbery. This conviction was reversed by the United States Court of Appeals for the Third Circuit because of the extra-record information that was related by one of the jurors to others in the group. Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).

Petitioner's third trial again resulted in a conviction for various offenses. Petitioner was then sentenced to seventy years imprisonment. (App. C).

The evidence against against petitioner consisted of eyewitness and circumstantial evidence. At petitioner's third trial the Government was allowed to introduce evidence of one Veena Henry to the effect that approximately two weeks after the bank robbery the petitioner has allegedly broken into Ms. Henry's home and robbed her. The Government had not tried to introduce this evidence at either of petitioner's first two trials. The District Court admitted the evidence pursuant to Federal Rules of Evidence 404(b) to establish identify. The petitioner interposed a timely objection arguing that the evidence should not be admitted because

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1The bank robbery counts were federal statutory violations (18 U.S.C. Sections 2113(a) and 2113(d), and were charged by a separate Information. The other charges were Virgin Islands violations (14 V.I.C. Section 1862(2); 14 V.I.C. Section 297(2); 14 V.I.C. Section 2253(a); 14 V.I.C. Section 2254; 14 V.I.C. Section 1083(1) and 14 V.I.C. Section 1392). The District Court for the Virgin Islands had jurisdiction pursuant to 48 U.S.C. 1612.

the defendant had been previously tried for the robbery for Ms. Henry and acquitted.

On appeal the petitioner again argued that the admission of this evidence was error entitling him to a new trial. The Third Circuit agreed with petitioner that the evidence was erroneously admitted. As discussed in more detail below, the basis of the Third Circuit's holding was not clear. The Court cited its own prior decision in United States v. Keller, 624 F.2d 1154 (3d Cir. 1980) where it had left open the constitutional issue presented by the admission of prior acquittal evidence and the Fifth Circuit's opinion in Wingate v. Wainright, 464 F.2d 209 (5th Cir. 1972), which had expressly precluded the use of such evidence on constitutional grounds.[2]

The court then considered the issue as to whether the admission of such evidence was harmless error. Stating that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right, the court then applied its "high probability" standard of harmless error review. 855 F.2d at 123. This standard required that the court have a "sure conviction that the error did not prejudice the defendant but need not disprove every reasonable possibility of prejudice." Id. The court then proceeded to review the evidence and, while not "entirely discount[ing]" the prejudice

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2The court also held alternatively that the district court abused its discretion in admitting the evidence pursuant to Rule 404(b), as the prejudicial value outweighed its limited probative value.

to petitioner by the admission of the prior acquittal evidence, ruled that the high probability standard had been met and that a new trial was not required. Id. at 124.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question that frequently occurs in criminal trials where when the Government attempts to introduce evidence under Rule 404(b), Federal Rules of Evidence,[3] concerning prior unrelated criminal conduct for which the defendant has previously been tried and acquitted. The majority of the circuits exclude such evidence. United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979); United States v. Keller, 624 F.2d 1154 (3d Cir. 1980); Wingate v. Wainright, 464 F.2d 209 (5th Cir. 1972); United States v. Day, 591 F.2d 861 (D.C. Cir. 1979); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984). Other circuits have held that the prior acquittal does not bar introduction of evidence concerning prior criminal conduct if such evidence would otherwise be admissible under Federal Rules of Evidence 404(b). United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979); United State v. Rocha, 553 F.2d 615 (10th Cir. 1977). Other Circuits approach the issue on a case-by-case basis focusing on the nature of the issue decided in the first trial and its relationship to the case under consideration. United States v.

3Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Johnson, 697 F.2d 735 (6th Cir. 1983).

The Circuits excluding such evidence have been unable to agree on the bases for their decision, variously citing either due process concerns, double jeopardy protection, or common law collateral estoppel principles as prohibiting the introduction of such evidence. Compare United States v. Mespoulede, supra, and Wingate v. Wainright, supra, with United States v. Keller, supra.

Although the Third Circuit agreed with petitioner that the evidence concerning the prior robbery for which the petitioner had been acquitted was erroneously admitted the court did not clearly state the basis for its conclusion. If such evidence is precluded by virtue of the due process or double jeopardy clause of the Fifth Amendment then this Court's decision in Chapman v. California, supra, would require the conviction be reversed unless it could be determined beyond a reasonable doubt that the admission of such evidence was harmless. See Albert v. Montgomery, supra. On the other hand if such evidence is merely barred on other than constitutional grounds, then the Third Circuit correctly applied the less stringent statutory harmless error standard.

In holding that the admission of the evidence was error the Third Circuit cited its own decision in Keller, supra, and the Fifth Circuit's decision in Wingate, supra. 855 F.2d 120-122. Wingate held the admission of the evidence concerning criminal conduct for which a defendant had been acquitted was "fundamentally unfair" and a violation of both due process and double jeopardy. 624 F.2d at 1160. Keller, on the other hand, while recognizing that this Court's opinion in Ashe v. Swenson, 397 U.S. 436 (1970)

might be read to incorporate collateral estoppel principles within the ambit of the double jeopardy clause even where multiple prosecution issues were not raised, nonetheless avoided the constitutional issue and held that common law principles of collateral estoppel barred evidence concerning crimes for which a defendant had been acquitted.

After holding the evidence inadmissible, the Third Circuit engaged in a lengthy harmless error analysis in this case. However, without any extended discussion, the Court simply stated that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right. 855 F.2d at 122. In so ruling, the Court made no reference to the question it left open in Keller concerning the relationship between collateral estoppel and double jeopardy in situations where the Government attempts to introduce prior acquittal evidence. The Court also failed to discuss the significance of its express approval of the Fifth Circuit's holding in Wingate excluding such evidence on constitutional grounds and its adoption of the Wingate language that such evidence was "fundamentally unfair and totally incongruous with our basic concept of justice." 855 F.2d at 121.

In refusing to apply the Chapman standard, the approach of the Third Circuit conflicts with that taken by the Second, Fifth and Eleventh Circuits which have found the admission of such prior acquittal evidence to be a violation of due process and/or double jeopardy. In Albert v. Montgomery, supra, the Eleventh Circuit specifically held that this Court's decision in Chapman provided the proper standard for analysis of the issue as to whether the

admission of such evidence was harmless error. The Second Circuit in United States v. Mespoulede, supra, and the Fifth Circuit in Wingate v. Wainright, supra, ordered new trials without engaging in any harmless error analysis at all.

This case is worthy of the Court's consideration for several reasons. First, this case presents an important question that occurs not infrequently in criminal trials and one which implicates fundamental concerns on behalf of both the Government and the defendant. The Government has a strong interest in being allowed to introduce evidence that bears upon relevant issues such as the defendant's identity, intent, motive, etc. See Federal Rules of Evidence 404(b). However, against this the courts must weigh the strong interest of a defendant against having to repeatedly defend against factual allegations which have previously been determined in his favor. See United States v. Mespoulede, supra; Albert v. Montgomery, supra.

Second, this Court should decide this issue because the Courts of Appeal are in considerable conflict not only on issue of the admissibility of such evidence, but also where there is agreement that such evidence is not to be admitted, there is disagreement as to the theoretical approach taken.

The Second, Fifth and Eleventh Circuits follow the rule that prior acquittal evidence is constitutionally barred by virtue of fundamental fairness required by the due process clause and/or collateral estoppel principles embodied in double jeopardy as announced in this Court's decision in Ashe v. Swenson, supra. See United States v. Mespoulede, supra; Wintgate v. Wainright, supra;

Albert v. Montgomery, supra. Other courts have explicitly rejected the double jeopardy and constitutional argument, but applied common law collateral estoppel principles to bar the introduction of such evidence if the record shows that the first jury must have decided the factual issue in favor of the defendant. United States v. Johnson, 697 F.2d 735 (6th Cir. 1983). The Third Circuit in United States v. Keller, supra, and in this case, seems to follow a different approach, holding that common law collateral estoppel principles bar the introduction of such prior acquittal evidence without regard to a specific determination as to whether the prior factual issue had conclusively been decided in the defendant's favor. Still other courts have barred the use of such evidence by citing collateral estoppel principles without reference to the constitutional issues raised by Ashe. See United States v. Day, 591 F.2d 861 (D.C. Circuit 1979). The Seventh Circuit has taken the approach that the admissibility of such evidence should be determined by the normal process of balancing the probative value of such evidence against the prejudicial value with a specific emphasis being placed on the fact that the probative value is lessened by the acquittal. See United States v. Phillips, 401 F.2d 301 (7th Cir. 1968). Finally, the Ninth and Tenth Circuits seem to hold that the fact of the prior acquittal is not determative where the evidence otherwise meets the standards of Federal Rules of Evidence 404(b). United States v. Rocha, supra; United States v. Van Cleave, supra. This case dramatically illustrates the different results obtained depending on the analysis utilized by the court.

Third, the Court should grant the writ to provide further clarification of the reach of this Court's opinion in Ashe v. Swenson, supra. The conflicts in the Courts of Appeal result from different interpretations of the applicability of the principles of Ashe to the attempted introduction of prior acquittal evidence in a subsequent prosecution that does not arise from the same conduct. The Second Circuit's decision in United States v. Mespoulede, supra, the Fifth Circuit's decision in Wingate v. Wainright, supra, and the Eleventh Circuit's decision in Albert v. Montgomery, supra, interpret Ashe as constitutionally prohibiting the use of prior acquittal evidence in such situations. Other circuits seem to read Ashe as only prohibiting multiple prosecutions based on the same factual scenario already determined in a defendant's favor and do not apply Ashe as a total bar of prior acquittal evidence. This precise question was left open by the Third Circuit in Keller, the principal authority relied upon in this case.

Since Ashe this Court has determined that an acquittal in a criminal case does not collaterally estop the same issue from being litigated in a civil case, One Lot Stones v. United States, 409 U.S. 232 (1972), that the principles of Ashe do not prohibit a defendant from being convicted of aiding and abetting even though the principle has been acquitted, Standefer v. United States, 447 U.S. 10 (1980), that a plaintiff in a Section 1983 action based on alleged violation of the Fourth Amendment is collaterally estopped from relitigating the issue after it had been adversely decided against him in a state court criminal proceeding, Allen v. McCurry, 449 U.S. 90 (1980), and that an acquittal does not bar subsequent

forfeiture proceedings based on the same conduct, United States v. One Assortment of Eighty-Nine Firearms, 465 U.S. 354 (1984). However, this Court has not addressed the important issue presented here which was left unanswered in Ashe and which has produced a great deal of conflict and disagreement in the Circuits.

Finally, this case presents a particularly appropriate vehicle for deciding these questions as the issue presented here is narrowly drawn and petitioner's argument is specifically tailored to the facts of this case. While specifically relying on its prior decision in Keller, where the constitutional issue was left open, the Third Circuit nonetheless clearly stated it was not obligated to apply the harmless error analysis required for errors of constitutional dimension. Had the Court applied the more stringent standard it is not clear that the result would have been the same. A prior trial where the evidence had not been admitted had resulted in a hung jury. In its lengthy harmless error analysis the Court specifically stated that it could not "entirely discount the possibility that there may have been some prejudice" to petitioner by introduction of the evidence. 855 F.2d at 123. If the prior acquittal evidence was inadmissible by virtue of either the due process or double jeopardy clauses of the Fifth Amendment then petitioner is entitled to have the effect of that error determined pursuant to this Court's decision in Chapman v. California, supra.

CONCLUSION

For the foregoing reasons, the petitioner especially submits that this Court should grant its petition for a writ of certiorari to review the decision of the United States Court of

Appeals for the Third Circuit in this case.

Respectfully submitted.

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Attorney for Petitioner

NOVEMBER 1988

CERTIFICATE OF SERVICE

I, Robert L. Tucker, an attorney admitted to practice before the United States District Court of the Virgin Islands, do hereby certify that I caused the original and nine (9) copies of the foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Third Circuit to be forwarded to the Honorable Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, and further certify that I cause two copies to be forwarded to the Solicitor General, Department of Justice, Washington, D.C. 20530; two copies to the United States Attorney's office, Hamilton House, Christiansted, St. Croix 00820; and one copy to petitioner, Reuben Dowling, this 28th day of November, 1988.

Robert L. Tucker

88-602

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

STATEMENT OF COUNSEL

I, Robert L. Tucker, being first duly deposed and sworn, do hereby state the following:

I am a member of the Bar of this Court. On November 28, 1988, within the time specified for filing a petition for writ of certiorari in the above-styled case, said petition was deposited in the United States post office mail box, with first-class postage prepaid, addressed to the Clerk of this Court, and accompanied by a Certificate of Service to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and the United States Attorney for the District of the Virgin Islands.

Robert L. Tucker

SUBSCRIBED AND SWORN to before me this 28th day of November, 1988.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Robert L. Tucker, an attorney admitted to practice before the Supreme Court of the United States, do hereby certify that I have on this date forwarded first-class, postage prepaid, a copy of the foregoing Statement of Counsel to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to the United States Attorney's office, Hamilton House, Christiansted, St. Croix, 00820. November, 1988.

Robert L. Tucker

(3)

NO.

88-6025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-3650

UNITED STATES OF AMERICA

v.

DOWLING, REUBEN
(D. C. Criminal No. 85-00070-01)

GOVERNMENT OF THE VIRGIN ISLANDS

v.

DOWLING, REUBEN
(D. C. Criminal No. 87-00071-01)

Reuben Dowling, Appellant

On Appeal from the District Court
of the Virgin Islands (St. Croix)

Argued April 22, 1988

Before SEITZ, SLOVITER, and BECKER,
Circuit Judges

(Opinion filed August 22, 1988)

Robert L. Tucker
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Attorneys for Appellant

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District of the Virgin Islands
Christiansted, St. Croix
U. S. Virgin Islands 00820

Attorneys for Appellees

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Reuben Dowling, who was convicted by a jury of several offenses arising out of a bank robbery, appeals on various evidentiary grounds. Dowling contends that the trial court abused its discretion in refusing to suppress photo identifications, in refusing to allow testimony by Dowling's expert witness on human perception, and in disallowing defense questioning of a witness concerning a civil suit arising out of the robbery, and that the court erred in admitting into evidence testimony concerning a crime for which Dowling previously had been acquitted.

I.

Facts

On the afternoon of July 8, 1985, a man armed with a pistol and disguised by a ski mask robbed the First

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Pennsylvania Bank in Frederiksted, St. Croix, taking approximately seven thousand dollars from two cash drawers. The robber ran from the bank to a parking lot across the street, then returned to the middle of the street and, pointing a gun, commandeered a passing taxi van. After a struggle with the taxi driver, the robber drove away in the van and took off his mask.

Antonio Messer, who had been in the bank but had managed to slip out in the course of the robbery, observed the robber's getaway. He testified that he was approximately fifteen feet away from the robber as he drove past and got a good look at the robber's face. He identified Dowling as the robber.

About a mile outside of Frederiksted, the robber drove the van into the front yard of Hayde Pichardo. Upset because her young children were playing there, Pichardo, who was observing events from her bedroom window, shouted an obscenity at the driver, getting a good look at his face when he made a full stop and stuck out his head to see who had hurled the invective at him. Pichardo's seventeen-year-old daughter, Amada Rosario, was also in the house and was watching through the window as the driver slowed down and put his head outside. The robber subsequently abandoned the van and fled on foot. Both Pichardo and Rosario identified Dowling as the driver.

Dowling was charged by information with the federal crimes of bank robbery, 18 U.S.C. § 2113(a) (Supp. IV 1986), and armed robbery, id. § 2113(d) (1982), and, under territorial law, with two counts of first-degree robbery, V.I. Code Ann. tit. 14, § 1862(2) (Supp. 1987), two counts of third-degree assault, id. § 297(2), illegal possession of a firearm during the commission of a violent crime, id. §§ 2253(a), 2254, grand larceny, id. § 1083(1) (1964), and unauthorized use of a vehicle, id. § 1382 (Supp. 1986). He pled not guilty to all the charges.

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Dowling's first trial ended in a hung jury. Dowling's conviction following a second trial was reversed on appeal.[1] After a third trial, Dowling was acquitted of the federal and territorial counts alleging possession of a firearm and convicted of the remaining counts. This appeal followed.

II.

The Photo Identifications

Dowling argues that the district court should have suppressed the evidence of the pre-trial identifications of Dowling by Pichardo, Rosario and Messer through several photographic arrays. He contends that the arrays were impermissibly suggestive and gave rise to a substantial likelihood of irreparable misidentification. The district court examined the photo arrays and concluded they were not suggestive.

Pichardo and Rosario were separately shown first an array consisting of five photographs, including one of Dowling that was several years old (Gov't Trial Exhibit 15). Both identified Dowling but stated that he looked younger in the photograph. Some time later they were shown an array of six photographs, none of Dowling (Gov't Trial Exhibit 11). They each said the person driving the van was not included. They were then shown an array of six color photographs containing a recent picture of Dowling (Gov't Trial Exhibit 12). Although they initially denied recognizing anyone, each identified Dowling the next day.[2]

1. We held that because there was a strong possibility that the jury had been exposed to extra-record information as to this case and Dowling's prior criminal conduct, the trial court erred in failing to develop a record sufficient to permit evaluation of the potential prejudice to the defendant. Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).

2. At trial, they explained that they had been reluctant to get involved.

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Messer was shown the array without Dowling (Exhibit 11) and the array with Dowling's recent picture (Exhibit 12), and picked no one out of the former and Dowling out of the latter.

Dowling complains that he is wearing a red tee-shirt in that exhibit and was pictured with individuals of noticeably different builds and skin hues. However, some of the other men also wore colored tee-shirts. In all three arrays, the photographs were virtually identical in composition and quality, and the men portrayed were reasonably comparable in dress and appearance. We agree with the district court that the photo arrays were not suggestive.

A few days after a line-up, at which Pichardo, Rosario and Messer failed to identify Dowling,[3] they were separately shown an array of photographs taken of the participants in the line-up and each picked out Dowling. Dowling contends that the process was impermissibly suggestive because his photograph was the only one repeated in the photo arrays that the principal witnesses saw prior to the line-up and prior to their viewing of the two arrays of photographs drawn from the line-up. The district court concluded that this repetition standing alone did not affect suggestiveness.

Under some circumstances, repetition of a photograph could be suggestive. However, a degree of suggestiveness does not in itself require exclusion of the evidence. "[R]eliability is the linchpin in

3. Pichardo and Rosario testified they had recently seen a movie in which, in the words of Pichardo, one of the men in a line-up "jumped through the glass and the thing fall on top of them and he take the gun and shoot everybody." App. at 256, and were too frightened at the line-up to identify anyone to the police. Rosario stated at trial that she had recognized the defendant. Messer testified that "I know that he was in there" but that he did not make a line-up identification because he was scared and because there were differences in Dowling's weight and hair-style as he appeared at the line-up and Messer's recollection of the robber.

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determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). If there was a suggestive identification procedure, the question becomes whether the suggestiveness "created 'a very substantial likelihood of misidentification.'" *United States v. Milhollan*, 599 F.2d 518, 522-23 (3d Cir.) (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)), *cert. denied*, 444 U.S. 909 (1979). This question is to be answered with reference to the "totality of the circumstances," with particular attention paid to such relevant factors as the quality of the witnesses' original opportunity to view the criminal, their degree of attention, their level of certainty when confronted with the suspect or his image, and the length of time between the crime and the confrontation. *See Neil*, 409 U.S. at 199-200; *Manson*, 432 U.S. at 114-16.

Here the witnesses all observed Dowling in good light, and had adequate, if not ample, time to form an impression. Messer, whose view was perhaps the least advantageous, made a deliberate effort to make an effective observation because, he testified, he knew he would be asked by the police for a description. Rosario and Pichardo were also more than just casual observers because Dowling was an undesirable intruder. All three witnesses were presented with photo arrays soon after the robbery, and all three identified Dowling's picture from the first array. All three picked no one from the pre-lineup array in which Dowling's photo was absent.

Against this is to be weighed the slight, and likely inadvertent, suggestiveness of the repeated use of different photographs of Dowling in succeeding photo arrays. There is no evidence that the police added in any way to the possible suggestiveness of the repetition, nor that they availed themselves of the photo arrays unnecessarily. Under these circumstances, we cannot say that there was a "very

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substantial likelihood of misidentification," and therefore the district court did not violate Dowling's right to due process in denying his motion to suppress.[4]

III.

Admission of Expert Testimony

Dowling contends that the district court abused its discretion in excluding the testimony of Dr. Harry Krop, who Dowling proffered as an expert on the psychological and physiological factors influencing the reliability of eyewitness identifications. The district court, following the dictates of *United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 725 (1988), and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), conducted an extensive *in limine* hearing. The court held that although Krop qualified as an expert in eyewitness identification, the testimony would not be admitted.

The court gave two reasons for its ruling. The court noted first that Dowling gave the government only five days' notice of the proposed proffer, and stated that "we are inclined to bar the testimony for this reason alone." App. at 368. In *Downing*, we stated that the trial court could consider "[t]he extent to which the adverse party has had notice of the evidence and an opportunity to conduct its own tests or produce opposing experts." 753 F.2d at 1241. The late proffer

4. Dowling also contends that the district court abused its discretion in failing to exclude the 1979 picture of Dowling because it was described at trial as the "old" or "1979 photograph", thereby suggesting that Dowling must previously have had contact with the police. Although a different description might have been preferable, the inference that Dowling suggests the jury could have drawn is speculative. The photograph was not a "mug-shot" that was clearly identifiable as the product of an arrest, and its introduction was not reversible error. *See* United States v. Hines, 470 F.2d 225, 229 (3d Cir. 1972), *cert. denied*, 410 U.S. 988 (1973).

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substantially prejudiced the government because, on such short notice, it could not reasonably be expected to search for its own expert and find one available to come to the Virgin Islands in time to be given the available facts and the opportunity to assimilate them. We therefore cannot hold that the district court abused its discretion in declining to admit the testimony on this ground alone.

The district court found "an additional compelling reason" to bar the testimony on the merits, concluding that the testimony would not aid the jury in reaching an accurate resolution. This, of course, as Judge Becker stated in his trailblazing opinion in *Downing*, is "[t]he touchstone of Rule 702." 753 F.2d at 1235.[5]

In *Downing*, we held that the district court should balance the general reliability of the scientific principles and their potential in aiding the jury against the likelihood that such information would mislead or overwhelm a jury. 753 F.2d at 1240. In addition, as Judge Becker thereafter explained in *Sebetich*, "admission depends upon the 'fit', *i.e.*, a specific proffer that the testimony will focus on particular characteristics of the eyewitness identification at issue and discuss how those characteristics call into question the reliability of the identification." *Sebetich*, 776 F.2d at 419.

The district court here recognized the "fairly established though controversial" nature of Krop's field, App. at 386, but found that "there was no testimony tying the specific data in the area of eye-witness identification to the eye-witness

5. Fed. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

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identifications under consideration here." App. at 386-87.[6]

From our review of the transcripts of the *in limine* hearing, in which Krop was questioned on the application of his expertise to the eyewitness, photographic and line-up identifications of the principal prosecution witnesses, Pichardo, Messer and Rosario, we find adequate support for the district court's conclusion. Krop testified that serious stress at the moment of observation usually reduces recall. Although this was arguably relevant as to Pichardo, who may have been afraid that her children were in danger or angry at the person who endangered them, Krop himself testified that Messer "probably would not have been in a high stress situation" and "would probably have a fairly good reliability for recall." App. at 53, and that it "does not sound like [Rosario] was in a high level of stress" when she viewed Dowling in the van, App. at 65.

Krop referred to the "weapon focus phenomena," App. at 33, the tendency of a person to focus more on the weapon than on the person wielding it, but there was no assertion that any of these witnesses made their observations while faced with a weapon. Similarly, Krop testified that fifteen seconds is "generally viewed as the minimal amount of time that a person has to view a situation to be able to give fairly

6. Dowling contends that the court erred in stating "that there were no scientific studies, treatises, etc. upon which Dr. Krop's testimony would be based." Appellant's Brief at 9, but our reading of the district court's opinion is different. Having reached the issue of "fit," the court had necessarily found there to be a sufficient scientific basis for Krop's testimony, and the court's statement that "there was simply no proffered proof reflecting treatises, reports, workshop results, research data or the like, *as to the possible misidentifications in this case*," App. at 387 (emphasis added), went to the lack of a connection between Krop's acknowledged expertise and the particular facts presented.

A 9

accurate recall." App. at 48, but there was no testimony at the hearing that any of the witnesses had less than fifteen seconds in which to view the suspect; on the contrary, in the Messer and Pichardo fact-patterns presented to Krop both were said to have had thirty seconds. App. at 53, 55-56. Krop testified that reliability was impaired when the witness was younger than thirteen or fourteen or older than sixty-five, but there was no evidence that the witnesses were in those age groups.

Krop also proffered various observations on the photo array identifications, but conceded under questioning by the court that virtually all his observations on the photo arrays were based on or equivalent to those to be derived from common sense. Krop's observation that witnesses presented with a series of photo arrays in which only the suspect's photo is repeated may "recognize" the suspect in one of the latter arrays based only on his familiarity from the earlier ones is of limited value in this case because, as we noted earlier, Dowling's picture was not repeated in each of the three pre-lineup arrays. Finally, Krop did not suggest that his testimony had any particular relevance to the identifications of the post-lineup pictures; instead he stated that "in terms of the lineup . . . , it sounds like where psychological theory is more relevant would be in terms of the original . . . perception . . . as opposed to the methodological identification during the lineup." App. at 85.

As these examples suggest, nearly all the factors Krop was prepared to testify affected witness reliability were not present in this case. Further, many of his observations were of the type no expertise was required to make. While the relevance of the testimony at least as to Pichardo's reliability is a closer issue, the district court properly applied the teachings of *Downing*, and we cannot say that its decision to bar the evidence was

an abuse of discretion. *See Downing*, 753 F.2d at 1240; *see also Sebetich*, 776 F.2d at 419.

IV.

Evidence of a Witness' Prior Civil Suit

Dowling also contends that the district court erred in disallowing Dowling's questioning of Messer regarding his loss of a civil suit against the bank for recovery of money he allegedly lost in the bank robbery. Dowling argues that because the civil suit had been characterized by the judge presiding in that case as "bordering on the frivolous" and because the verdict represented the jury's rejection of Messer's claim that he left money on the counter of the bank during the robbery, this was relevant cross-examination of Messer which he should have been able to use to impeach Messer's credibility.

Under Fed. R. Evid. 608(b), the district court has the discretion to admit evidence of specific instances of conduct to impeach a witness' credibility "if probative of truthfulness or untruthfulness." *See United States v. Bocra*, 623 F.2d 281, 287-88 (3d Cir.), (review for abuse of discretion), *cert. denied*, 449 U.S. 875 (1980). The Advisory Committee Notes to Fed. R. Evid. 608(b) caution that "the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.*

In this case, the district court noted that the civil jury's decision could have been based on grounds other than disbelief in Messer, and that examination on the entire civil suit was "far too much outside of the issue." App. at 220-21. The court did allow Dowling to use previously introduced photographs of the bank during the robbery to impeach Messer insofar as he testified on direct that he left the money on the counter. The

court did not abuse its discretion in holding that the danger of confusion so outweighed the probative value of the evidence as to justify barring that line of questioning.

V.

Evidence of Acts Subject to a Prior Acquittal

A.

Propriety of the Evidence

We turn finally to the most troublesome issue raised by this appeal, the court's admission of the testimony of Vena Henry, who described how a man wearing a knitted mask with cut out eyes (of a different color than the one worn by the bank robber) and carrying a small handgun (which was similar to the black silvery gun used in the bank robbery), accompanied by Delroy Christian, broke into her home in Frederikated two weeks after the robbery, and how, in a struggle, she pulled the mask off the intruder, whom she identified as Dowling. App. at 143-44. Dowling was thereafter charged by the Government of the Virgin Islands with burglary, attempted robbery, assault, and weapons offenses, and was acquitted after a trial. App. at 147; Information, Criminal No. 85-64.

Dowling argues that the introduction of Henry's testimony was in violation of Fed. R. Evid. 404(b)[7] and

7. Evidence of "other crimes, wrongs, or acts" may be admitted to prove, among other things, identity, but not "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b); *see, e.g.*, United States v. Milhollan, 599 F.2d 518, 524-25 (3d Cir.), cert. denied, 444 U.S. 909 (1979). *See generally* 2 J. Weinstein & M. Berger, Weinstein's *Evidence* ¶ 404[15] (1988) (discussing proof of identity through "evidence of a crime which has the same unusual features as the charged crime").

improperly prejudiced him under Fed. R. Evid. 403. Dowling relies on our decision in *United States v. Keller*, 624 F.2d 1154, 1159 (3d Cir. 1980), the closest precedent in this court.

The defendant in *Keller*, who had been convicted of conspiracy to distribute a controlled substance following the jury's rejection of his entrapment defense, claimed on appeal that the trial court had erred in permitting the government to undermine his defense by questioning him about other drug transactions for which he had been prosecuted and acquitted. We reversed, holding that the doctrine of collateral estoppel barred the evidence. *Id.* at 1157-60.

In *Keller*, we referred to the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause, *see, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Venable*, 585 F.2d 71 (3d Cir. 1978), but we relied for our holding on this court's precedent, *see United States v. Simon*, 225 F.2d 260 (3d Cir. 1955); *United States v. De Angelo*, 138 F.2d 466 (3d Cir. 1943), that "consistently applied [the doctrine of collateral estoppel] to bar the evidentiary use of crimes for which the defendant has been acquitted." 624 F.2d at 1160. We quoted with approval the following statement by the Fifth Circuit:

> [I]t is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit.

Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972), *quoted in Keller*, 624 F.2d at 1160.

The government argues that *Keller* notwithstanding, the evidence was admissible in this case because the issue of Dowling's identity and his

use of a knitted mask and small handgun in the Henry incident was not determined in his favor by the acquittal verdict. It cites as legal authority a district court opinion in *United States v. Hill*, 550 F. Supp. 983 (E.D.Pa. 1982), *aff'd mem.*, 716 F.2d 893 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984), which it states holds that *Keller* is only applicable where the evidentiary fact sought to be introduced in a subsequent trial "has been actually determined in defendant's favor in the trial which resulted in defendant's acquittal." Appellee's Brief at 22. That is not what *Hill* held.

In *Hill*, the defendant, who had been tried at his first trial on seven counts, was acquitted on two and found guilty on five. After this court reversed and remanded for a new trial on those counts, defendant was again found guilty. Obviously, as the district court there noted, evidence in support of the five counts on which Hill was previously found guilty was not precluded by our opinion in *Keller*. 550 F. Supp. at 988. The court further determined that even if it was error to admit evidence of the distribution for which Hill was acquitted, it was harmless beyond a reasonable doubt. *Id.* at 988-89. Nothing in *Hill* puts the gloss on *Keller* that the government argues.[8]

8. Moreover, in *Keller* we rejected a virtually identical argument to that made by the government here, saying:

> The Government argues . . . that . . . Keller did not deny the fact of his participation in the drug distributions but claimed that he was excused from criminal prosecution because he was entrapped. The Government contends that collateral estoppel is inapplicable because "[i]t is not the result of the prior case that was material, but rather the *facts* which were undisputed." Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge

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Nor is there any evidence to support the government's premise that the issue of Dowling's identity and his use of the knitted mask and small handgun was not determined in his favor by the acquittal. No extrinsic evidence of the record in the earlier case against Dowling was introduced. Apparently, the same trial judge presided in both. The following colloquy in this case is the only light shed on the events in the other:

> [ASST U.S. ATTORNEY]: Your Honor, having the case described to me -- I wasn't here -- but the Defense in the case presented, not through Mr. Dowling but through his co-defendant Delroy Christian, it was not a robbery. The two of them merely came to retrieve from an individual in the house money from an individual in the house.
>
> THE COURT: Mr. Dowling's presence in the house was not seriously contested in the case but *he stated the general defense*. Mr. Dowling, I don't think, took the stand.

App. at 154 (emphasis added).

This is an insufficient basis on which to conclude that the issue of Dowling's participation in the robbery was not determined. Since Dowling entered a not guilty plea and did not testify, the government was required to prove all the elements of the case against him beyond a reasonable doubt. His co-defendant's explanation

> and level of participation did not satisfy the requirement of the criminal law. We decline to so hold since that would eviscerate the effect of the prior acquittal.

Keller, 634 F.2d at 960 (citations omitted); accord Blackburn v. Cross, 510 F.2d 1004, 1007 (5th Cir. 1975) ("there is no difference between relitigating an ultimate fact or an evidentiary fact; relitigation of either is prohibited" by doctrine of collateral estoppel); see also United States v. Crispino, 500 F. Supp. 1525, 1530-32 (D.N.J. 1980).

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imposed no burden on him. Even assuming that Dowling's identity and presence in Henry's house were not specifically disputed, we believe that the government cannot legitimately assert that evidence concerning one element of an offense is separable for evidentiary purposes from a jury's general verdict of acquittal merely because it was not directly contradicted.[9]

Even apart from *Keller*, we believe the evidence in this case was inadmissible. The Supreme Court has recently had occasion to consider the operation of Fed. R. Evid. 404(b) in *Huddleston v. United States*, 108 S. Ct. 1496 (1988) (holding that a federal district court need not find that the government has proven the similar act by a preponderance of the evidence before it is admissible under Rule 404(b)). The Court stated that, "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at 1501. It follows that when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude "that the act occurred and that the defendant was the actor."

Even if the *Huddleston* analysis would not, of itself, exclude as irrelevant all acts which were the subject of a prior acquittal, in this case the evidence of pattern on which the district court relied was at best tenuous. The district court held that the evidence of the Henry incident "falls well within the ambit" of Rule 404(b) because "the common features that link the

9. This issue is distinguishable from that which arises when a defendant has been acquitted on one count of a multi-count indictment and is being retried on other counts. Courts have held that acquittal on one charge arising out of a set of facts does not preclude the use of the same evidence to prove a second charge on retrial. *See United States v. Gentile*, 816 F.2d 1157, 1164 (7th Cir. 1987). We express no view on that issue.

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bank robbery and the later occurrence are largely the mask and the gun, albeit a mask of different color or the like, and no evidence that the gun was the same, except that it was a small caliber handgun." App. at 159-60.

The balance required by Fed. R. Evid. 403 necessitates a consideration of prejudice as well as probative value. In *United States v. Beechem*, 582 F.2d 898 (5th Cir. 1978) (in banc), *cert. denied*, 440 U.S. 920 (1979), approvingly cited in *Huddleston*, 108 S. Ct. at 1501, the court pointed out that "[o]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense." 582 F.2d at 914. The court continued, "[t]his danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." *Id.*

When the limited similarity of the alleged offense behavior in the bank robbery and the Henry incident is coupled with the fact that the jury's verdict in the Henry occurrence must be taken to signify that it was not proven that Dowling committed the "bad" act charged (either because it was not Dowling or it was not a robbery), the marginal relevance of the evidence was more than amply outweighed by the potential prejudice. *See United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968). We thus conclude that in addition to being inconsistent with *Keller*, the admission of the Henry testimony was an abuse of discretion.

B.

Effect of the Error

A new trial is necessary only if the error in admitting the evidence was not harmless. We need not

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in this case be convinced that the error was harmless beyond a reasonable doubt. In *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1899 (1987), this court held that when the challenged instruction did not affect a constitutional right, "we must apply the 'highly probable' standard of appellate review to determine the harmlessness of the error." *Accord Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). We explained further that, "'[h]igh probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant' but need not disprove every 'reasonable possibility' of prejudice." *Grayson*, 795 F.2d at 290 (citing *United States v. Jannotti*, 729 F.2d 213, 219-20 & n.2 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984)).

The putative prejudice flowing from the admission of Henry's evidence is that it influenced the jury's conclusion that Dowling was the masked robber. However, as the district court stated at sentencing, the evidence was "overwhelming". Sentencing Transcript at 16. In this case, there were three positive identifications. Messer testified that he had "a clear recollection in [his] own mind of what the face of the man looked like" who ran from the bank and removed the mask from his head. App. at 201. He testified that it was a clear day and he had a clear view of what was going on. App. at 197-98. He stated that as the man passed him, "I knew I was trying to identify somebody, looking for a feature or face or something like that, because I know I would have to say something to the police officials or give a description or something like that." App. at 197.

Pichardo was equally certain in her identification of Dowling as the man who drove into her yard.[10] She

10. The defense brief concedes that the man who drove into the Pichardo yard was the bank robber.

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stated, in identifying Dowling in the courtroom, "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks." App. at 249. Rosario also gave a positive identification of Dowling at the trial. Messer not only saw the robber take off his mask, but pursued the taxi van in his own vehicle to where the van was abandoned near Pichardo's home in Estate Smithfield. This forges an iron link between the eyewitness accounts of the robbery and the identifications of the van's driver by Pichardo and Rosario. Finally, as we discussed above, each of the eyewitnesses identified Dowling through various photographic arrays shown to them shortly after the robbery.

There was other strong evidence. Messer testified that the robber was tall, fit and clad in a green army shirt, a description that was corroborated by numerous witnesses. Bank employees Williams, Sanes, Austin, Moorehead and Santiago all remembered the robber wore a green army shirt, several of them also testifying that he was athletically built and six feet or more tall. Bank customer Fabio also testified that the robber was an athletically built man, about 6' 1" tall, wearing a green shirt. A Special Agent of the F.B.I., who had used the bank security photographs of the robbery to estimate the robber's height, testified that he was probably at least 6 feet tall. Of course, the jury was able to judge for itself whether this description matched Dowling's physique.

The government also presented a strong circumstantial case hinging on the robber's haphazard getaway. The government's theory presented to the jury was that it was unlikely that a robber who took pains to conceal his face with a mask and who wore gloves to avoid fingerprints would have no better getaway plan than to hijack a taxi. Numerous witnesses testified

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that the robber had run around outside the bank after the robbery apparently looking for something. The government posited that the robber's original plan to leave by a getaway car had been foiled while he was in the bank.

The government presented the testimony of several witnesses to support this theory and to connect Dowling to the crime. Philip Tutein testified that Dowling had borrowed a white Volkswagen a day or two before the robbery. Anthon Christian, a police officer, testified that on the morning of the robbery, he noticed a white Volkswagen stalled on a road occupied by a man wearing a green army shirt and the same kind of hat from which the robber's mask was made, and that he noted the license number of the car, which was later identified as Tutein's. Police sergeant Anita Christian testified that at about the time of the robbery, she was patrolling in town and saw a white Volkswagen parked at a spot later described as near the bank. The front door of the car was open and it was occupied by two persons, one of whom was her cousin Delroy Christian. She asked the driver to close the door, and the car then drove off and out of town. Dowling himself testified that he knew Delroy Christian. He also admitted borrowing Tutein's white Volkswagen and was unable to proffer any evidence as to where he was on July 8.

Of course, we cannot entirely discount the possibility that there may have been some prejudice to Dowling by the introduction of Henry's testimony which, if credited, implicated Dowling in a prior bad act. Also, the government in its closing statement pointed to Henry's identification of Delroy Christian as accompanying Dowling, which could be seen as supporting the government's theory of the getaway car.

However, our standard on harmless error applicable here is not one of certainty of no prejudice, but one of "high probability". In that connection, we

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note that the district court did caution the jury in its general instructions as to the limited value of the Henry testimony. The court stated that the Henry testimony "was presented to you for you to consider in the contexts, and to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. Mr. Dowling was found not guilty of the crime of robbery in connection with that." Supp. App. at 29. The prosecutor also pointed in his closing to the limited purpose for which the Henry evidence was admitted, and defense counsel stressed Dowling's acquittal in her opening statement to the jury.

Moreover, when Dowling testified in his own defense, he stated that he was acquitted in the Henry incident charge but admitted that he had been convicted of another bank robbery in 1979.[11] In light of that testimony, which was properly admitted, it is unlikely that the admission of the Henry testimony more than marginally affected the jury's overall character assessment of Dowling.

There are instances in which the erroneous admission of prior bad acts evidence will not be harmless. Evaluation of the prejudice occasioned by a trial error is a fact-specific process. In light of our review of the entire record, we conclude that there is a "high probability" that the error in admitting the Henry testimony did not prejudice Dowling. *See*

11. Instructing on impeachment, the court stated: "[O]ne of the ways in which impeachment evidence is permitted is if a person testifies then that person may be demonstrated to have had a prior felony conviction and that that happened in this case when Mr. Dowling exercised his rights to take the stand and testify under oath. Then it was permitted to be shown that in 1979 he was convicted of the felony of bank robbery." Trial Transcript, September 24, at 38.

United States v. Ezzell, 644 F.2d 1304, 1306 (9th Cir. 1981) (where three eyewitnesses to bank robbery identified defendant and he was photographed by the security camera, error in admitting evidence of prior bank robbery was harmless).

VI.

For the reasons set forth above, we will affirm the judgment of conviction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3650

UNITED STATES OF AMERICA

v.

REUBEN DOWLING, etc.,
Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

The petition for rehearing filed by

Appellant, Reuben Dowling

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: September 28, 1988

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IN THE DISTRICT COURT OF THE VIRGIN ISLA
DIVISION OF SAINT CROIX

RECEIVED
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UNITED STATES OF AMERICA, Plaintiff, vs. REUBEN DOWLING, Defendant.	CRIMINAL NO. 1985/70 BANK ROBBERY
GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff, vs. REUBEN DOWLING, Defendant.	CRIMINAL NO. 1985/71

FILED
1987 SEP 25 PM 2:30
CLERK OF THE COURT

JUDGMENT AND COMMITMENT

On the 24th day of September, 1987 came the Assistant United States Attorney for the Government, and the defendant appeared in person and with counsel, Melody L. Moss, Esquire, Assistant Federal Public Defender.

The defendant was charged with:

BANK ROBBERY - COUNT I & COUNT II (CR. NO. 85/70)

ROBBERY FIRST DEGREE - COUNTS I & VI (CR. NO. 85/71)
ASSAULT THIRD DEGREE - COUNTS II & III
POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME OF VIOLENCE - COUNT IV
GRAND LARCENY - COUNT V
UNAUTHORIZED USE OF A VEHICLE - COUNT VII

At arraignment, the defendant pleaded Not Guilty. A jury trial was demanded by the defendant and on September 22, 1987, the jury trial commenced and concluded on September 24, 1987. The jury returned a verdict finding the defendant Guilty of

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BANK ROBBERY - COUNT I (CR. NO. 85/70

ROBBERY FIRST DEGREE - COUNTS I & VI (CR. NO. 85/71)
ASSAULT THIRD DEGREE - COUNT II & III
GRAND LARCENY - COUNT V
UNAUTHORIZED USE OF A VEHICLE - COUNT VII

The matter having been referred to the Probation Office for a pre-sentence investigation and report, which has been filed with the Court, the defendant was given an opportunity to make a statement in his own behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of twenty (20) years on Count I of the Federal Information, Criminal No. 85/70 and Counts I, II, III and V of the Virgin Islands Government Information, Criminal No. 85/71.

Defendant shall also pay fine of $50.00 for costs.

Pursuant to 14 V.I.C. Sec. 61 and 62, defendant is committed to the custody of the Director of the Bureau of Corrections for imprisonment for a period of fifty (50) years on Count VI and VII in Criminal No. 85/71. At least ten (10) years of the sentence imposed herein shall be served without parole, probation, suspension or reduction by good time or otherwise. Sentence imposed on Counts VI and VII shall be served consecutive to the sentence imposed on Count I in Criminal No. 85/70 and Counts I, II, III and V in Criminal No. 85/71.

It is ADJUDGED that the defendant be given credit for time served in pre-trial detention.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

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DATED: September 25, 1987 ENTER:

DAVID V. O'BRIEN
District Court Judge

Attest: Orinn Arnold
Clerk

by: Deputy Clerk

~~3A19~~

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Supreme Court, U.S.
FILED
FEB 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA
AND
GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

WILLIAM C. BRYSON
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EDWARD S.G. DENNIS, JR.
Assistant Attorney General

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QUESTION PRESENTED

Whether it was reversible error for the trial court to admit evidence, in petitioner's trial for offenses arising out of a bank robbery, of another similar robbery of which petitioner had been acquitted in an earlier trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-6025

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA
AND
GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 855 F.2d 114.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1988. A petition for rehearing was denied on September 28, 1988. The petition for a writ of certiorari was filed on November 28, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a); two counts of first-degree robbery, in violation of V.I. Code Ann. tit. 14, §1862(2) (1987 Supp.); two counts of third-degree assault, in violation of V.I. Code Ann. tit. 14, §297(2); one count of grand larceny, in

violation of V.I. Code Ann. tit. 14 §1083(1); and one count of unauthorized use of a vehicle, in violation of V.I. Code Ann. tit. 14, §1382. Petitioner was acquitted of armed robbery, in violation of 18 U.S.C. 2113(d); and illegal possession of a firearm during the commission of a violent crime, in violation of V.I. Code Ann. tit. 14, §§2253(a), 2254. He was sentenced to 70 years' imprisonment.

1.a. The evidence at trial showed that on the afternoon of July 8, 1985, a man armed with a pistol and wearing a ski mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix. The ski mask was a blue or black woven mask with two holes cut out for the eyes, and the pistol was a small caliber handgun. The robber took approximately $7000 from the cash drawers of two tellers, and then ran from the bank to a parking lot across the street. After running around and apparently looking for something, the robber returned to the middle of the street and, pointing a gun, commandeered a passing taxi van. Following a brief struggle with the taxi driver, the robber drove away in the van and took off his mask. Pet. App. A2-A3, A19-A20.

Antonio Messer, who had been in the bank but had managed to slip out during the robbery, observed the robber's getaway. He was approximately 15 feet away from the robber as he drove past, and he got a good look at the robber's face. Messer then pursued the van in his own vehicle. At trial, Messer identified petitioner as the robber. Pet. App. A3, A18-A19.

About a mile outside of Frederiksted, the robber drove the van into the front yard of Hayde Pichardo, who was watching from her bedroom window. Pichardo became upset because her young children were playing in the front yard, and she shouted an obscenity at the driver of the van. She got a good look at the driver's face when he stopped the van and stuck his head out the window to see who had shouted at him. Amada Rosario, Pichardo's 17-year old daughter, was also watching out the window, and she

saw the driver's face as he slowed down and put his head outside. At trial, both Pichardo and Rosario identified petitioner as the driver. Pet. App. A3, A18-A19.

A number of witnesses testified that the robber was tall, fit, and athletically built, and an FBI agent estimated, based upon bank security photographs, that the robber was probably at least six feet tall. The jury was able to compare petitioner's physique to these characteristics. Pet. App. A3, A18-A19.

Messer and other witnesses to the robbery testified that the robber had been dressed in a green army shirt. A police official testified that on the morning of the robbery he had seen a white Volkswagen stalled by the side of the road occupied by a man wearing a green army shirt and the same kind of hat from which the robber's mask was made. Petitioner had borrowed this Volkswagen the day before. At about the time of the robbery, a second officer saw a white Volkswagen parked near the bank with its front door open. The occupants of the car were Delroy Christian and a second individual. The officer told them to close the door, and they drove away. The officer followed the car for about a mile before turning around. Shortly thereafter, the officer received a radio report about the bank robbery. Pet. App. A20.

b. At trial, the government also offered testimony, pursuant to Fed. R. Evid. 404(b), that petitioner and Christian had committed another robbery two weeks after the bank robbery. The theory on which the evidence was offered was that the two robberies had similar features that justified the inference that petitioner had been the bank robber. Vena Henry testified that a man -- carrying a small handgun (which was similar to the one used in the bank robbery), wearing a brown knitted ski mask with eye holes, and accompanying Christian -- had broken into her home in Frederiksted on July 28, 1985. During the ensuing struggle, Henry pulled the ski mask off the robber and saw the robber's

face. At the trial for the bank robbery, she identified petitioner as the individual who had broken into her home with Christian. Pet. App. A12. The district court admitted this evidence after determining, by "clear and convincing evidence," that it fell "within the ambit of" Rule 404(b) of the Federal Rules of Evidence and that "it was more probative than prejudicial." C.A. App. 160A.

In connection with the incident at Henry's house, petitioner was charged under territorial law with burglary, attempted robbery, assault, and weapons offenses. He was tried for and acquitted of those offenses before his trial for the bank robbery began. Pet. App. A12.

2. The court of appeals affirmed petitioner's conviction on the offenses arising from the bank robbery (Pet. App. A1-A22). After rejecting several other claims of error, it ruled that Vena Henry's testimony concerning the robbery of her home should have been excluded from evidence (id. at A12-A17). However, the court also determined that this error, which it did not find to be of constitutional magnitude, was harmless (id. at A17-A22).

a. The court cited two alternative grounds for its conclusion that Henry's testimony should have been excluded:

First, relying on its decision in United States v. Keller, 624 F.2d 1154 (3d Cir. 1980), the court held that petitioner's acquittal of the charges arising from the robbery at Henry's house collaterally estopped the government from offering evidence of that incident in petitioner's bank robbery trial. The court noted that Keller had referred to "the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause," but determined that the case's holding was based instead on case law from the Circuit that "'consistently applied [the doctrine of collateral estoppel] to bar the evidentiary use of crimes for which the defendant was

acquitted'" (id. at A13 (quoting United States v. Keller, 624 F.2d at 1160)).1/

Second, the court held (Pet. App. A16-A17) that the evidence was inadmissible under the Federal Rules of Evidence. Relying on Huddleston v. United States, No. 87-6 (May 2, 1988), the court found that the robbery of Henry's house was not admissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, the second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor'" (Pet. App. A16 (quoting Huddleston v. United States, slip op. 8)). Even if Huddleston did not require exclusion of the evidence, the court of appeals continued, the prior acquittal had to be taken "to signify that it was not proven that [petitioner] committed the 'bad' act charged" and thus "the marginal relevance of the evidence was more than amply outweighed by the potential prejudice" (Pet. App. A17). See Fed. R. Evid. 403.

1/ The court rejected the government's argument that the doctrine of collateral estoppel did not apply because the facts for which the prosecution had introduced evidence of the Henry incident in this case -- that petitioner had accompanied Christian to Henry's house wearing a knitted ski mask (of a type rarely sold in that tropical locale) and carrying a small handgun of the type used in the bank robbery -- were not necessarily determined in petitioner's favor by his acquittal. Pet. App. A13-A16. The government maintained that, because Christian had testified during the first trial that he and petitioner had been in Henry's house, but for the purpose of collecting a debt, as opposed to robbing her, the jury's acquittal reflected its acceptance of this characterization of the incident, as opposed to a finding that someone other than petitioner had participated in the incident at Henry's house (Govt. C.A. Br. 23). The district judge, who had presided over both trials, observed that "[petitioner's] presence in the house was not seriously contested in the case" arising from the incident at Henry's house, but added that petitioner had "stated the general defense" and had not taken the stand (id. at A15). Placing the burden of proof on this issue on the government, the court of appeals found "an insufficient basis on which to conclude that the issue of [petitioner's] participation in the robbery was not determined" in the first trial (ibid.).

In our view, the court of appeals mistakenly placed the burden of proof on the government on this issue. See, e.g., United States v. Gentile, 816 F.2d 1157, 1162 (7th Cir. 1987); United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988).

b The court of appeals ruled, however, that the admission of Henry's testimony was harmless error. Stating that it "need not in this case be convinced that the error was harmless beyond a reasonable doubt," the court applied its "high probability" standard of review for errors that have not affected a constitutional right (Pet. App. A17-A18). The court explained that this "high probability" standard required it to "have a 'sure conviction that the error did not prejudice the defendant,'" but not to "disprove every 'reasonable possibility' of prejudice" (id. at A18 (quoting United States v. Grayson, 795 F.2d 278, 290 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987)).

In applying this standard, the court of appeals joined in the trial court's characterization of the evidence against petitioner as "overwhelming" (Pet. App. A18). The court noted that there were "three positive identifications" of petitioner, and emphasized the certainty with which the witnesses had expressed themselves (id. at A18-A19). These identifications were buttressed, the court continued, by numerous witnesses' descriptions of the robber and a "strong circumstantial case" (id. at A19). On the day of the bank robbery a man fitting the robber's description had been seen in a Volkswagen which petitioner had borrowed. There was also evidence that this Volkswagen was to have been the getaway car for the robbery, before its occupants drew the attention of the police and moved on, forcing the robber to commandeer a taxi van. Id. at A19-A20.

The court of appeals also noted that the district court had instructed the jury of the "limited value" of testimony regarding the incident at the Henry house and of petitioner's acquittal of charges arising from it (Pet. App. A21). Further, because evidence of a prior felony conviction was lawfully introduced to impeach petitioner, the court found that "it is unlikely that the

admission of the Henry testimony more than marginally affected the jury's overall character assessment of [petitioner]" (ibid.).

In light of its "review of the entire record," the court of appeals concluded that "there is a 'high probability' that the error in admitting the Henry testimony did not prejudice [petitioner]" (Pet. App. A21).

ARGUMENT

Petitioner contends that the admission of evidence of the robbery at the Henry house violated his constitutional rights. Accordingly, he asserts that the court of appeals should have applied the harmless error standard that it applies to constitutional claims. He also argues that, in the course of determining which harmless error standard is applicable to this case, this Court could resolve a conflict among the courts of appeals as to the admissibility of evidence of other alleged offenses of which the defendant has previously been acquitted. Pet. 5-11. We agree that, in light of the importance of the issues presented in this case, further review is warranted.

1. As petitioner points out, the courts of appeals are in conflict as to whether the government may introduce evidence of an offense of which a defendant has been acquitted to prove a different offense in a later trial. Typically, such evidence is offered under Rule 404(b), Fed. R. Evid., or an analogous state rule of evidence. The Second, Third, Fifth, Sixth, Eleventh and District of Columbia Circuits have taken the position that the prior acquittal estops the government from introducing evidence of facts that were necessarily determined in the prior trial. United States v. Mespoulede, 597 F.2d 329, 332-336 (2d Cir. 1979); United States v. Keller, 624 F.2d at 1157-1160; United States v. Mock, 604 F.2d 341, 343-344 (5th Cir. 1979); Wingate v. Wainwright, 464 F.2d 209, 211-215 (5th Cir. 1972); United States v. Johnson, 697 F.2d 735, 739-741 (6th Cir. 1983); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984); United States v. Day,

591 F.2d 861, 868-869 (D.C. Cir. 1978). The Second, Fifth, Eleventh, and D.C. Circuits rely on the Double Jeopardy Clause, as construed in Ashe v. Swenson, 397 U.S. 436 (1970), and, in some cases, "fundamental considerations of fair play" or "basic concepts of justice." United States v. Mespoulede, 597 F.2d at 334-335; Wingate v. Wainwright, 464 F.2d at 212-215; Albert v. Montgomery, 732 F.2d at 869-870. The Third and Sixth Circuits have ruled that the doctrine of collateral estoppel, in its nonconstitutional sense, forecloses the admission of this type of evidence. The Eighth, Ninth and Tenth Circuits do not view an acquittal as a bar to evidence of the defendant's participation in other offenses that is otherwise admissible under applicable rules of evidence. United States v. Riley, 684 F.2d 542, 545-546 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969).2/

The court of appeals' conclusion that the doctrine of collateral estoppel requires exclusion of evidence that is otherwise admissible under Rule 404(b) is also in conflict with the reasoning of recent decisions of this Court. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Huddleston v. United States, No. 87-6 (May 2, 1988). In 89 Firearms, this Court held that a defendant's acquittal on charges of illegally selling firearms did not bar a subsequent action seeking forfeiture of firearms seized from the defendant. Collateral estoppel was inapplicable, the Court explained, because of "the difference in the relative burdens of proof in the criminal and

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2/ State courts have also reached varying conclusions as to the admissibility of this type of evidence. See Annotation, Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense, 25 A.L.R. 4th 934.

civil [forfeiture] actions." 465 U.S. at 362. An acquittal of criminal charges represents only "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." Helvering v. Mitchell, 303 U.S. 391, 397 (1938). Accord 89 Firearms, 465 U.S. at 359, 361-362; One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1973). See United States v. Hogue, 812 F.2d 1568, 1578 (11th Cir. 1987). Thus, an acquittal does not negate the possibility that the facts "determined" in the criminal case -- in the sense of not being proved to a jury's satisfaction beyond a reasonable doubt -- will nevertheless be established by a lower standard of proof in a subsequent proceeding governed by that lower standard. 89 Firearms, 465 U.S. at 362.2/

Huddleston makes clear in turn that the admissibility of evidence under Rule 404(b) is not dependant on proof of "conditional facts" beyond a reasonable doubt. In that case, the Court held that a trial court need not make a preliminary finding that the government has proved other similar acts by a preponderance of the evidence before admitting evidence of those acts for a purpose permitted by Rule 404(b). Rather, the Court concluded that such evidence is "subject only to the general strictures" of Rules 402 and Rule 403. Under these rules, all "relevant evidence" -- that is, "evidence having any tendency to

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2/ In 89 Firearms, the Court disapproved the statement in Coffey v. United States, 116 U.S. 436, 443 (1886), that an acquittal of criminal charges was "conclusive" in a subsequent forfeiture proceeding as to "the existence of the same act or fact" in issue in the criminal case. See 465 U.S. at 358, 361. The starting point for the application of collateral estoppel to evidence of other crimes has been a similar misconception as to the effect of an acquittal. See, e.g., United States v. Keller, 624 F.2d at 1157 (prior judgment of acquittal is "conclusive as to all the judgment determined" (quoting United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943)); United States v. Mespoulede, 597 F.2d at 333 (construing acquittal of drug possession charge as determination that defendant did not possess the drugs in issue); Wingate v. Wainwright, 464 F.2d at 214 (prosecution may not "relitigate an issue which was determined in a prior prosecution of the same parties"). See also J. Weinstein & M. Berger, Weinstein's Evidence, para. 404[10] at 404-74, 803(22)[01] at 803-260 n.48 (1988 ed).

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401) -- is admissible unless its prejudicial effect outweighs its probative value. Thus, when presented with a dispute over a fact bearing on the relevance of evidence offered in accordance with Rule 404(b), a trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence." Huddleston, slip op. 9.4/

Obviously, a jury's determination that the government has not proved beyond a reasonable doubt that a defendant committed an offense does not foreclose a judge from later finding that evidence of the defendant's actions satisfies the lower standard prescribed by the Rules of Evidence. In this respect, the second determination is indistinguishable from the use of evidence in a forfeiture proceeding of the type involved in 89 Firearms. In terms of this case, the district judge was not foreclosed by petitioner's prior acquittal from determining that the jury could reasonably find, by a preponderance of the evidence, that petitioner had engaged in a robbery at Henry's home and that the similarities between the circumstances surrounding that robbery and the bank robbery tended to make it more probable that petitioner was the bank robber. Cf. Smith v. Wainwright, 568 F.2d 362, 364 (5th Cir. 1978) (analyzing burdens of proof where acquittal of other offense followed conviction based on its use as "other crime" evidence). Giving meticulous attention to Rules 403 and 404(b), the district court admitted the evidence only after making a finding that the evidence was probative, under a

4/ There is no anomaly in admitting evidence that a jury may find probative only by a preponderance of the evidence to prove guilt beyond a reasonable doubt. "[I]t is not to be supposed that every witness can make a home run." Notes of Advisory Committee on Proposed Fed. R. Evid. 401, quoting Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956).

standard higher than that mandated by Huddleston, and determining that the evidence was more probative than prejudicial. See C.A. App. 143A-160A. Contrary to the court of appeals' opinion, therefore, petitioner's acquittal, if given the preclusive effect due under 89 Firearms, should not have rendered inadmissible the evidence that petitioner had participated in a robbery at Mrs. Henry's home.5/

In short, the court of appeals' conclusion that the evidence of petitioner's participation in a robbery at Henry's house was inadmissible conflicts with the decisions of other courts of appeals and the reasoning of decisions of this Court. As the reported decisions reflect, the issue frequently arises in both state and federal courts. Evidence offered under Fed. R. Evid. 404(b) is often helpful to factfinders in criminal cases. The exclusion of such evidence, on grounds inconsistent with the decisions of this Court and principles of collateral estoppel, raises questions that warrant this Court's review.

2. Since the court of appeals expressly passed upon the admissibility of evidence of the Henry robbery under the doctrine of collateral estoppel and the Rules of Evidence, the Court could appropriately address those issues. However, since the court of appeals also held that the admission of Henry's testimony was harmless error under the standard that it applies to

5/ As alternative bases for its holding, the court of appeals determined that evidence of the Henry robbery was inadmissible under Rule 404(b) and was an abuse of discretion under Rule 403. Both conclusions, however, were premised on the court's mistaken view of the preclusive effect of the acquittal in the prior case. With respect to Rule 404(b), the court of appeals said petitioner's acquittal foreclosed a subsequent jury from making the finding required by Huddleston (Pet. App. A16), thereby ignoring the difference in the applicable burdens of proof. Similarly, in striking the balance between probative value and prejudice required by Rule 403, the court stated that the prior jury's not guilty verdict "must be taken to signify that it was not proven that [petitioner] committed the 'bad' act charged" (Pet. App. A17), a view that is flatly inconsistent with 89 Firearms. Apart from the court of appeals' mistaken view of the effect of petitioner's acquittal, therefore, the district court's decision to admit the evidence was not an abuse of its discretion under the Rules.

nonconstitutional claims,[6] it would not be strictly necessary to reach the question whether the evidence should have been excluded on nonconstitutional grounds. Nevertheless, even if this case were viewed as raising only the question whether the Double Jeopardy Clause prohibits evidence of an offense of which a defendant has been acquitted, it would still present an opportunity for this Court to resolve an important issue on which the courts of appeals are in conflict as to the meaning of a decision of this Court.

As we noted above, four of the six Circuits that have concluded that an acquittal bars use of evidence of an offense of proof of guilt of another offense -- the Second, Fifth, Eleventh, and District of Columbia Circuits -- have rested their decisions on the Double Jeopardy Clause, as construed in Ashe v. Swenson, supra. These decisions are in conflict with the decisions of the two courts of appeals that have reached the same result on nonconstitutional grounds, the Third and Sixth Circuits, as well as the decisions of those courts of appeals that reject the view that acquittal bars evidence otherwise admissible under Rule 404(b), the Eighth, Ninth, and Tenth Circuits. See pp. 7-8, supra. There is thus a significant conflict among the courts of appeals on the constitutional issue raised by this case.

If evidence of "other crimes" of which the defendant has been previously acquitted is inadmissible, the question whether such an error is of constitutional or nonconstitutional dimension is important for two reasons. First, it may dictate whether

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[6] We believe that the evidence in this case, which both lower courts characterized as "overwhelming" (Pet. App. A18), and other circumstances relied upon by the court of appeals (id. at A17-A22) would justify the conclusion that any error in admitting the evidence of the Henry robbery was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1967). However, the court of appeals expressly reserved that issue. If this Court agreed with petitioner as to the inadmissibility of the evidence and the appropriate harmless error standard, the Court would have the option of resolving that issue itself or remanding the case to the court of appeals so that it could make that determination. See United States v. Lane, 474 U.S. 438, 450 (1986).

errors of this type are subject to review on collateral attack of state court convictions in federal habeas corpus proceedings. Second, the nature of any such error has been regarded as dictating the harmless error standard that courts of appeals must use in determining whether the error requires reversal in a particular case. If any such error is constitutional in nature, as the Second, Fifth, Eleventh, and District of Columbia Circuits have held, the courts have applied the harmless error standard articulated in Chapman v. California, 386 U.S. 18 (1967), i.e., whether the error has been shown to be harmless beyond a reasonable doubt. If any such error is nonconstitutional in nature, as the Third and the Sixth Circuits have held, the courts have held that the applicable standard is the more lenient one drawn from Kotteakos v. United States, 328 U.S. 750 (1946), i.e., whether the error had a substantial influence on the outcome of the case.

Contrary to the view of the Second, Fifth, Eleventh, and District of Columbia Circuits, Ashe v. Swenson, supra, does not support the conclusion that the Double Jeopardy Clause prohibits the introduction of evidence of an offense of which the defendant has been acquitted. In that case, Ashe was charged with robbing Knight, one of six persons held up during a poker game, and was acquitted. The state then charged Ashe with robbing another member of the same game, and obtained a conviction. This Court reversed the conviction, holding that the doctrine of collateral estoppel, which the Court concluded was embodied in the Double Jeopardy Clause, barred relitigation of whether Ashe was one of the robbers. The Court explained (397 U.S. at 445 (emphasis added)):

> the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. [Collateral estoppel], therefore, would make a second

> prosecution for the robbery * * * wholly impermissible.

Ashe thus held that the collateral estoppel doctrine incorporated in the Double Jeopardy Clause bars a successive prosecution of a defendant where a prior acquittal necessarily determines in the defendant's favor a fact which, in the subsequent prosecution, must be proved beyond a reasonable doubt.7/ Ashe does not suggest, however, that the government is precluded in a subsequent prosecution from introducing evidence of a defendant's participation in an offense, for the purposes permitted by Fed. R. Evid. 404(b), to prove a separate offense not inconsistent with the prior acquittal.8/

Therefore, as we view this case, it presents two questions on which the courts of appeals are divided and which warrant this Court's review: whether evidence that has resulted in an acquittal is inadmissible for any purpose at a later trial and, if so, whether the improper admission of such evidence is constitutional or nonconstitutional error. Of course, if the Court concludes, as we submit, that the evidence in this case was admissible, the judgment below can be affirmed without reaching the second issue. But if the Court agrees with the Third Circuit that the evidence was inadmissible, the Court will be faced with the question whether that result is required by the Constitution,

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7/ See Blackburn v. Cross, 510 F.2d 1014, 1017 (5th Cir. 1975) (applying collateral estoppel to "evidentiary facts" "significantly expanded the Ashe holding").

8/ Petitioner suggests that, apart from the Double Jeopardy Clause, the Due Process Clause may prohibit use of evidence of a prior offense of which a defendant has been acquitted for the purposes permitted by Rule 404(b). See Pet. 8. While some courts have invoked "fundamental considerations of fair play" (United States v. Mespoulede, 597 F.2d at 334) or "basic concepts of justice" (Wingate v. Wainwright, 464 F.2d at 215) to justify exclusion of such evidence, it cannot fairly be suggested that the Constitution goes farther than the doctrine of collateral estoppel in this area. Indeed, in Hoag v. New Jersey, 356 U.S. 464, 471 (1958), a decision rendered before the Double Jeopardy Clause was held applicable to state prosecutions, the Court affirmed a conviction on facts that were very close to those in Ashe v. Swenson and expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement."

and thus whether the Third Circuit applied the correct harmless error standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1989

(5)

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 28, 1988
CERTIORARI GRANTED FEBRUARY 27, 1989

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DISTRICT COURT OF THE VIRGIN ISLANDS

No. 85-70

UNITED STATES

v.

REUBEN DOWLING

No. 85-71

GOVERNMENT OF THE VIRGIN ISLANDS

v.

REUBEN DOWLING

DOCKET ENTRIES

DATE	PROCEEDING
08/22/85:	Information filed in *United States v. Reuben Dowling* and Information filed in *Government of the Virgin Islands v. Reuben Dowling*.
11/12-14/85:	Jury trial both Informations: hung jury.
03/31-04/2/85:	Petitioner's second trial: guilty verdicts returned.
04/25/85:	Judgment of the District Court pursuant to jury's verdict.

DATE	PROCEEDING
06/26/87:	Opinion and judgment of the United States Court of Appeals for the Third Circuit reversing the petitioner's conviction and remanding for a new trial.
09/22-24/87:	Petitioner's third jury trial: guilty verdicts returned.
09/25/87:	Judgment of the District Court pursuant to jury verdict.
08/22/88:	Opinion of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction.

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF SAINT CROIX

Criminal No. 85-70

18 U.S.C. § 2113(a), (d)

BANK ROBBERY

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN DOWLING,
Defendant.

INFORMATION

The United States Attorney charges:

COUNT I

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did, with the use of force and intimidation, take from the person and presence of another money, said money having been in the care, custody, control, management and possession of the First Pennsylvania Bank, Frederiksted Branch, St. Croix, the deposits of said bank being insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. § 2113 (a).

COUNT II

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did, in committing an offense defined in 18 U.S.C. § 2113(a), put in jeopardy the

lives of employees and customers of the First Pennsylvania Bank, Frederiksted Branch, St. Croix by the use of a dangerous weapon, to wit: A handgun, in violation of 18 U.S.C. § 2113(d).

Dated: August 21, 1985.

JAMES W. DIEHM
United States Attorney

By: /s/ Andrew J. Reich
ANDREW J. REICH
Assistant U.S. Attorney

TERRITORY OF THE VIRGIN ISLANDS)
) ss:
DIVISION OF SAINT CROIX)

AFFIDAVIT

I, Lawrence E. Motta, Jr., first being duly sworn depose and say:

1. That I am employed by the Virgin Islands Police Department as a Detective/Corporal assigned to the Investigation Bureau;

2. That while thus employed, I was assigned to conduct a follow up investigation into a robbery that occurred on July 8, 1985, at the First Pennsylvania Bank, located on Strand Street, Frederiksted, St. Croix.

3. That the deposits of the First Pennsylvania Bank are insured by the Federal Deposit Insurance Corp.;

4. That eyewitnesses to the robbery, stated that the Bank was robbed by a lone gunman, wearing a mask;

5. That the witnesses and bank officials stated that the gunman took approximately $7,833.00 in U.S. currency from the bank teller, approximately $5,000.00 in U.S. curreny from a customer, and that travelers checks and personal checks were also taken;

6. That thereafter the lone gunman left the Bank and made good his escape by taking a taxi van, CP-294 at gunpoint, from Maurice Hamilton;

7. That the taxi van CP-294 was abandoned in Estate Smithfield;

8. That while driving away from the scene, the gunman was observed by a witness removing his mask (Witness No. 1);

9. That prior to abandoning the taxi van CP-294, the gunman was seen maskless in the Estate Smithfield area, by two individuals, (Witnesses No. 2 and No. 3);

10. That photo arrays were displayed in separate sessions to Witnesses No. 1, No. 2 and No. 3, at which time identifications were made by Rueben Dowling;

11. That on August 12, 1985, a physical line-up consisting of Rueben Dowling and other male individuals was viewed by the three witnesses, but no positive identification was made at that time;

12. That on August 13 and 14, 1985, photo arrays were again displayed in separate sessions to the three witnesses who viewed the physical line-up on August 12, 1985;

13. That the three witnesses independently selected the photograph of Rueben Dowling, and claimed that they had seen him in the line-up of August 12, 1985, but were afraid to identify him at that time;

WHEREFORE, in view of the aforementioned, your affiant has probable cause to believe that Rueben Dowling committed the crimes of BANK ROBBERY, in violation of 18 U.S.C. § 2113(a) and (d); GRAND LARCENY, in violation of 14 V.I.C. § 1083; ARMED ROBBERY, in violation of 14 V.I.C. § 1862(2); POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE, in violation of 14 V.I.C. § 2253(a); UNAUTHORIZED USE OF A VEHICLE, inviolation of 14 V.I.C. § 1382; and ASSAULT THIRD DEGREE, in violation of 14 V.I.C. § 297(2).

/s/ Lawrence E. Motta, Jr.
LAWRENCE E. MOTTA, JR.
Detective/Corporal
V.I. Police Department
ST. Croix, Virgin Islands

Subscribed and sworn before me this 21st day of August, 1985.

/s/ [Illegible]
Notary Public

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

Criminal No. 85-71

Title 14 V.I.C. § 1083
Title 14 V.I.C. § 1862(2)
Title 14 V.I.C. § 2253(a) & 2254
Title 14 V.I.C. § 1382
Title 14 V.I.C. § 297(2)

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

RUEBEN DOWLING,
Defendant.

GRAND LARCENY; ARMED ROBBERY; POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME OF VIOLENCE; UNAUTHORIZED USE OF A VEHICLE; ASSAULT THIRD DEGREE

INFORMATION

The United States Attorney charges:

COUNT I

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully take United

States currency from Irma Williams, Isabel Sanes and Mae Burwell, employees of the First Pennsylvania Bank, Frederiksted Branch, St. Croix, from their immediate presence and against their will, by means of force and fear by displaying, using and threatening to use a dangerous weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 1862(2).

COUNT II

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Irma Williams with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT III

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Isabel Sanes with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT IV

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully assault Mae Burwell with a deadly weapon; to-wit: A handgun, in violation of Title 14 V.I.C. § 297(2).

COUNT V

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING, when not authorized by law to do so, did possess and carry about his person a firearm used during the commission of a crime of violence, to-wit: Robbery and assault in violation of Title 14 V.I.C. § 2253(a) and 2254.

COUNT VI

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully steal and carry away property with a value in excess of one hundred dollars ($100.00) belonging to the First Pennsylvania Bank, Frederiksted Branch, St. Croix, with the intent to permanently deprive the owner thereof, in violation of 14 V.I.C. § 1083(1).

COUNT VII

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING did unlawfully take a taxi van from Maurice Hamilton, from his immediate presence and against his will, by means of force and fear by displaying, using and threatening to use a dangerous weapon; to-wit: A handgun, in violation of title 14 V.I.C. § 1862(2).

COUNT VIII

On or about the 8th day of July, 1985, in the Virgin Islands of the United States, Judicial Division of St. Croix, RUEBEN DOWLING, a person not entitled to possession of a taxi van, license plate number CP-294, belonging to Maurice Hamilton, did possess, use and drive said vehicle without the consent of the owner and with intent to deprive said owner, temporarily or otherwise thereof, in violation of Title 14 V.I.C. § 1382.

Dated: August 21, 1985.

JAMES W. DIEHM
United States Attorney

By: /s/ Andrew J. Reich
ANDREW J. REICH
Assistant U.S. Attorney

TERRITORY OF THE VIRGIN ISLANDS)
) ss:
DIVISION OF SAINT CROIX)

AFFIDAVIT

I, Lawrence E. Motta, Jr., first being duly sworn depose and say:

1. That I am employed by the Virgin Islands Police Department as a Detective/Corporal assigned to the Investigation Bureau;

2. That while thus employed, I was assigned to conduct a follow up investigation into a robbery that occurred on July 8, 1985, at the First Pennsylvania Bank, located on Strand Street, Frederiksted, St. Croix;

3. That the deposits of the First Pennsylvania Bank are insured by the Federal Deposit Insurance Corp.;

4. That eyewitnesses to the robbery, stating that the Bank was robbed by a lone gunman, wearing a mask;

5. That the witnesses and bank officials stated that the gunman took approximately $7,833.00 in U.S. currency from the bank teller, approximateyly $5,000.00 in U.S. currency from a customer, and that travelers checks and personal checks were also taken;

6. That thereafter the lone gunman left the Bank and made good his escape by taking a taxi van, CP-294 at gunpoint, from Maurice Hamilton;

7. That the taxi van CP-294 was abandoned in Estate Smithfield;

8. That while driving away from the scene, the gunman was observed by a witness removing his mask (Witness No. 1);

9. That prior to abandoning the taxi van CP-294, the gunman was seen maskless in the Estate Smithfield area, by two individuals, (Witnesses No. 2 and No. 3);

10. That photo arrays were displayed in separate sessions to Witnesses No. 1, No. 2 and No. 3, at which time identifications were made of Rueben Dowling;

11. That on August 12, 1985, a physical line-up consisting of Rueben Dowling and other male individuals was viewed by the three witnesses, but no positive identification was made at that time;

12. That on August 13 and 14, 1985, photo arrays were again displayed in separate sessions to the three witnesses who viewed the physical line-up on August 12, 1985;

13. That the three witnesses independently selected the photograph of Rueben Dowling, and claimed that they had seen him in the line-up of August 12, 1985, but were afraid to identify him at that time;

WHEREFORE, in view of the aforementioned, your affiant has probable cause to believe that Rueben Dowling committed the crimes of BANK ROBBERY, in violation of 18 U.S.C. § 2113(a) and (d); GRAND LARCENY, in violation of 14 V.I.C. § 1083; ARMED ROBBERY, in violation of 14 V.I.C. § 1862(2); POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE, in violation of 14 V.I.C. § 2253(a); UNAUTHORIZED USE OF A VEHICLE, in violation of 14 V.I.C. § 1382; and ASSAULT THIRD DEGREE, in violation of 14 V.I.C. § 297(2).

/s/ Lawrence E. Motta, Jr.
LAWRENCE E. MOTTA, JR.
Detective/Corporal
V.I. Police Department
ST. Croix, Virgin Islands

Subscribed and sworn before me this 21st day of August, 1985.

/s/ [Illegible]
Notary Public

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

Criminal No. 1985/70

BANK ROBBERY

UNITED STATES OF AMERICA,
Plaintiff,

vs.

REUBEN DOWLING,
Defendant.

Criminal No. 1985/71

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

REUBEN DOWLING,
Defendant.

JUDGMENT AND COMMITMENT

On the 24th day of September, 1987 came the Assistant United States Attorney for the Government, and the defendant appeared in person and with counsel, Melody L. Moss, Esquire, Assistant Federal Public Defender.

The defendant was charged with:

Bank Robbery—Count I & Count II (Cr. No. 85/70)

Robbery First Degree—Counts I & VI (Cr. No. 85/71)

Assault Third Degree—Counts II & III

Possession of a Firearm During the Commission of a Crime of Violence—Count IV

Grand Larceny—Count V

Unauthorized Use of a Vehicle—Count VII

At arraignment, the defendant pleaded Not Guilty. A jury trial was demanded by the defendant and on September 22, 1987, the jury trial commenced and concluded on September 24, 1987. The jury returned a verdict finding the defendant Guilty of

Bank Robbery—Count I (Cr. No. 85/70

Robbery First Degree—Counts I & VI (Cr. No. 85/71)

Assault Third Degree—Count II & III

Grand Larceny—Count V

Unauthorized Use of a Vehicle—Count VII

The matter having been referred to the Probation Office for a pre-sentence investigation and report, which has been filed with the Court, the defendant was given an oppportunity to make a statement in his own behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of twenty(20) years on Count I of the Federal Information, Criminal No. 85/70 and Counts I, II, III and V of the Virgin Islands Government Information, Criminal No. 85-71.

Defendant shall also pay fine of 50.00 for costs.

Pursuant to 14 V.I.C. Sec. 61 and 62, defendant is committed to the custody of the Director of the Bureau of Corrections for imprisonment for a period of fifty (50)

years on Count VI and VII in Criminal No. 85/71. At least ten (10) years of the sentence imposed herein shall be served without parole, probation, suspension or reduction by good time or otherwise. Sentence imposed on Counts VI and VII shall be served consecutive to the sentence imposed on Count I in Criminal No. 85/70 and Counts I, II, III and V in Criminal No. 85/71.

It is ADJUDGED that the defendant be given credit for time served in pre-trial detention.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated: September 25, 1987

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN
District Court Judge

Attest: Orinn Arnold
Clerk

by: /s/ Alice A. Maynard
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF 9-22-87

* * * *

[6] ATTORNEY MARSHACK: We have a 404B motion, Your Honor.

THE COURT: Go ahead with that.

ATTORNEY MARSHACK: At this time?

THE COURT: Yes, sir, unless you prefer to make it in open court as well. It is up to you.

ATTORNEY MARSHACK: We are proffering under Rule 404B, we proffered the testimony of Vera Williams —Vera Henry, who lived at number 99 Strawberry on the 21st or the 22nd of July within a period of two weeks of the robbery in which Mr. Dowling is alleged to have entered the First Pennsylvania Bank in Frederiksted wearing a hat with or—an herb hat or a mask with only the eye holes cut out in the knitted mask and carrying a small handgun.

He entered the house of Vera Henry wearing a mask with only the eye holes cut out and carrying a small handgun, and in his company was a man named Delroy Christian. During the time that he was in the house of Vera Henry he expended a shot. It was an automatic weapon [7] so that the shot's casing came out and landed on the ground. It was collected by Officer Michael Freeman who gave it to Officer George Bennerson.

During the time there was a scuffle and Mrs. Vera Henry, a woman who at that time at least in her fifties

pulled the brown knitted cap with the eye holes cut out off the head of the Defendant; that was Reuben Dowling. The Government offers this evidence as to the identity of the man who was in the First Pennsylvania Bank two weeks earlier.

I guess I would be divulging a little bit of additional testimony that I will bring in this case that was not brought in the last case, that on the night before the bank robbery Phillip Tutein lent a white Volkswagen to Reuben Dowling. On the morning of the bank robbery, the Volkswagen with the license plate number C-46470, is a white Volkswagen owned by Phillip Tutein was seen on the Mahogany Road by Captain—Chief Anthon Christian of the Virgin Islands Police Department who noticed that the car was stalled in the middle of the road.

There was a person sitting in the back with a dark knitted hat, had a dark [8] complexion and a very large frame and had on a green army fatigue shirt. He made a note of that, later in the day when he heard the all points bulletin broadcast for the robbery of the bank.

At about 2:15 in the afternoon, Sgt. Anita Christian and Police Officer Jesus Roman were patrolling in the Frederiksted area near the ballpark and saw a white Volkswagen. The white Volkswagen was occupied by Peter Golden and Delroy Christian, a cousin to Anita Christian. The door was open and Delroy Christian was sitting in the back seat. The police pulled up and they said, close the door because it was obstructing the road. Anita waved at her cousin, who acknowledged her, Delroy Christian.

The police drove around, keeping that vehicle in view. After a period of two or three minutes, seeing the police car in view, Peter Golden and Delroy Christian took the white Volkswagen and drove out of Frederiksted. This takes us to 2:20, 2:23 to 2:25. They drove out with the police behind them to the Northside Road, making a right on Mahogany Road. After they made the right the police followed them all [9] the way to the La Grange intersection. Before turning around and returning to their patrol, during the next several minutes they heard a broadcast of a bank robbery at the First Pennsylvania Bank.

The entry of Reuben Dowling into the home two weeks —within two weeks of the bank robbery, in the presence of Delroy Christian, carrying a small handgun and wearing a mask with only the eye holes cut out creates three times as much identity—probative identity evidence, showing that it is the same person that entered the bank on July 8th, wearing a mask with the eye holes cut out, carrying a small caliber handgun, was the same person involved in the Strawberry incident with Delroy Christian, who was not available to assist Mr. Dowling to get away from the bank he robbed, causing him the need to force Mr. Maurice Hamilton at gunpoint to turn over his vehicle so that he could make the getaway.

There would also be people in the bank testifying that when Mr. Dowling came out of the bank that he looked up and down both streets for a period of time before [10] commandeering the van. I think the evidence is fair and clear. Should I go through the case, Your Honor?

THE COURT: Make your presentation as you choose.

ATTORNEY MARSHACK: Rule 404B says that other crimes, wrongs or acts of evidence is not admissible to prove character or propensity.

THE COURT: Do I understand from my own memory that Mr. Dowling was acquitted of that Strawberry matter?

ATTORNEY MARSHACK: Yes, Your Honor.

THE COURT: Well, if it is admitted, I think in the interest of justice it would have to be brought out that, in as far as any criminal matters are concerned, Mr. Dowling was acquitted of that, and this—it is being offered only for the identification and the information.

ATTORNEY MARSHACK: Even absent the acquittal, Your Honor, such an instruction is mandated by all of the circuits.

THE COURT: Go ahead, sir—[11] excuse me. Is Mr. Joseph there? Bring him in. I'm going to take care of Mr. Joseph and get him out.

(Whereupon, Mr. Joseph was escorted into the chambers and the following occurred)

THE COURT: Good morning, Mr. Joseph. How are you, sir?

MR. JOSEPH: Fine.

THE COURT: Mr. Joseph, I am going to excuse you from sitting on this case, not for any fault of yours but some information has come to us that your wife is the baby sitter for the child of one of the ladies that works at the Public Defender's Office.

MR. JOSEPH: Yes.

THE COURT: And because of that and in the excess of caution, because I have four alternates I am going to excuse you from having to sit on this case. Thank you for being here this morning, and we will see you on October 5th. Were you picked on the next one?

MR. JOSEPH: No.

THE COURT: You're excused until somebody calls you. Thank you very much, [12] Mr. Joseph.

MR. JOSPEH: Right.

(Whereupon, Mr. Joseph was excused and the following occurred out of his presence back in chambers)

ATTORNEY MARSHACK: The standards for admission of other crimes of evidence need not be beyond a reasonable doubt or in fact even to clear and convincing evidence, but it must clearly be relevant.

I cite *United States v. Mitchell*, 666, F.2nd, 1385. It is a 1982 case out of the 5th Circuit and Cert. was denied, 102 Supreme Court 2943.

THE COURT: Excuse me. Do you intend to tie the color of the alleged mask?

ATTORNEY MARSHACK: It is a different color. A different color ski mask was admitted from that that was used during the charged robbery. The color ski mask that was taken from the individual, not in connection with any crime at all, was admitted, notwithstanding the difference in color from that that was used during the charged robbery.

Thomas v. United States, 343, [14] at D.C., 333, F.2nd at 90.

In *Hope v. United States*, 342, F.2nd, pg. 153, that is a 1965 5th Circuit case. There is a close—in that case the court held that the close connection in time, place or manner was sufficient for the admission of such evidence. Here we have less than two weeks, same island and three common features each which are distinct. We talk about the mask and I cited the case for that.

For a gun case we need not go very terribly far because the 3rd Circuit said at 685, F.2nd, at pg. 860, the right cite for that is 857 Government v. Shelly Joseph. In that case the court held that on the testimony of a friend of Shelly Joseph, that two months prior to the crime of which he was charged at that time he was in possession of a gun different than the gun used in the crime for which he was charged. The court said that it was not an error and, to be fair, that was reversed.

THE COURT: That was reversed on improper submission to the jury of a document.

ATTORNEY MARSHACK: In the case of *United States v. Covelli*, 738, F.2nd, [15] 847, a 1984 case, the court admitted testimony that an earlier time Mr. Covelli tapped his leg and said, I've got an equalizer that makes me as big or bigger than anyone. And the girlfriend testified that while living with him in 1978 that she saw him possess a small gun. The court held that the

possession of a small gun was sufficiently distinct to be admitted pursuant to 404B.

In a case which I think most closely parallels this one, *United States v. Etherton*. 519 F.2nd at 60, that is a 1st Circuit case, Cert. denied, US 1987. The court held that the fact that a bank robber held a silver gun and tape on its nose in an uncharged bank robbery was sufficient, annexes in similarity to admit that evidence in the charged bank robbery which he used a silver gun and tape on its nose. I would submit that the court has found unique the carrying of a small handgun. The court found significant, as a matter of fact, different colors distinct, as you will see, because the brown mask is a—I guess they are called herb hats, and you will see that one of the ones that was seized at the home at Strawberry had cutout eye holes. The people in the bank will testify that although [16] the mask used was of a different color and there were eye holes and no mouth holes.

I looked throughout this island for a store that sells ski masks and looked for catalogs containing balaclavas that are used on slopes, which have holes cut out for the eyes and the mouth. I couldn't find one. There is no ski store here on St. Croix.

If the Court recalls the case of Raymond Peterson, and there is some relevance here where there are some similarities here. He had a mask, herb hat with nothing cut in it, absolutely, which he pulled down over his face tight enough so that he could see through the weaved strings. When he turned to drive away in the stolen truck he pulled it off his head and made himself identifiable.

THE COURT: Nobody ever credited The Mexican with a great deal of smarts. That was his nickname. Have you completed your argument?

ATTORNEY MARSHACK: Your Honor, there are three major characteristics. They are to be viewed as either identity or surrounding circumstantial evidence.

They are [17] necessary in surrounding circumstantial evidence to tie the presence of Delroy Christian in the white car to Delroy Christian entering the house at Strawberry. They all go to the identity of the person in the bank.

THE COURT: Miss Moss.

ATTORNEY MOSS: Your honor, I don't think that the common features of a mask and a handgun and the arguable presence of another person in that car constitutes—arises to the standards that it must arise to. I submit that under 404B, the characteristics, the quality for an identity for this evidence to be admitted as an identity, to go to identity must rise to the class of a signature of crimes. There are many many cases on signature of crimes. I think that with each set of facts, the set of facts is the key in each case, and that with those set of facts you have different rules, depending on the circumstances of the robberies or crimes committed. I think that under Rule 404B Attorney Marshack stated that he didn't believe that the standard was to clear and convincing evidence. My understanding is that it is to clear and convincing evidence, and I think that alone, that the fact that Mr. Dowling [18] was acquitted of the crime at Strawberry—

THE COURT: He was not acquitted on the issue of identification. I don't believe so.

ATTORNEY MARSHACK: Your Honor, having the case described to me—I wasn't here—but the Defense in the case presented, not through Mr. Dowling but through his co-defendant Delroy Christian, it was not a robbery. The two of them merely came to retrieve from an individual in the house money from an individual in the house.

THE COURT: Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think, took the stand.

ATTORNEY MARSHACK: He had not. Mr. Christian did.

ATTORNEY MOSS: Nonetheless, I think the prejudicial effect is obvious and a chief concern of course of mine. Another standard of this evidence is that there is a substantial need for this evidence. I would submit under the circumstances there is no substantial need for this evidence of the presence [19] of Mr. Dowling in another home, in a home opposed to a bank, with a mask on and carrying a small handgun. I don't think that the fact that he has on a mask and carrying a small handgun has at all a significant signature type quality to it. There are, I am sure, thousands of people who have attempted to commit crimes with masks on, be it the holes cut out, be the holes already in the mask, and I seriously question whether this evidence rises to any kind of a quality to get it in under Rule 404B.

I cited for purposes of discussion of signature crimes *United States v. Gutierrez*, 696, F.2nd 753. This is a 1982 case and it comes out of the 10th Circuit.

United States v. Ortega Chavez, out of the 5th Circuit, 1982 case 682, F.2nd, 1086.

United States v. Dansker out of the 3rd Circuit. 1976, 537, F.2nd, 40.

THE COURT: Is that your argument, Miss Moss?

ATTORNEY MOSS: Yes, Your Honor. I believe that arguably Attorney Marshack has presented his idea of what the [20] consequential findings to which this evidence will go. I submit, of course, applying it as well to the other standards that to the other requirements under Rule 404B that he does not meet the test. And I submit that even if the Court finds that it does meet the test it certainly failed under Rule 403 as to the relevance, especially in light of trying to get at Mr. Dowling in a potential manner or obviously in a prejudicial manner of doing it.

THE COURT: Mr. Marshack?

ATTORNEY MARSHACK: I want to address two things. One thing I want to address is the substantial

need. Without this the line of evidence leading to Mr. Delroy Christian and tying the absence of the white vehicle of the need to take the van of Maurice Hamilton isn't very tenuous.

Additionally, with respect to substantial need, the identification evidence which was available has been excluded by the manner in which the police in my office did the identification. The Court is presently considering additionally other testimony which may make identity very very difficult for the [21] Government to prove. Even in the absence of that, John Chamble, the Defense lawyer in the last case, got here with respect to identification. So I believe there is a substantial need on all of those before you. And with respect to signature crime rules, I quote from *United States v. Gates*, which is reported at 481, 24, that is quoted by Drew, that any probative evidence is inherently prejudicial, but when the evidence is relevant and important to one of the five exceptions it is generally conceded that the prejudicial effect may be outweighed by the probative value.

I believe that Gates is presently either before the Supreme Court or it was announced in the last term—I mean in the beginning of this term. I want to talk about two cases briefly. With respect to signature crimes in the actions of the Court of Appeals, I think the further that the court has gone in admitting other crime evidence is *Gally v. United States* 408, F.2nd, 1220, out of the District of Columbia, 1979. There the court found no error in a trial court's admission of an 8-year-old assault and robbery charge during defendant's [22] trial for a felony murder and assault to commit rape. The defendant was accused of approaching his victim at her home in the District of Columbia on the grounds to seeking to enter the room and killing her. After a second motivated attack the trial court admitted evidence that eight years earlier in West Virginia, hundreds of miles from the District of Columbia, that the defendant assaulted a hotel night clerk after she had escorted him to a room as he requested. When he threatened to rape

her the clerk offered the defendant money. He took it and fled. The Court of Appeals found significant similarities in the modus operandi probative to the identity to similarly what Gates talked about. Two different kinds of attacks in areas apart in time; one was a rape and one was a robbery.

Your Honor, here we have events within two weeks showing a small handgun, and I cited the cases, that is enough by itself, and I think even on the basis we have more than enough reason to allow this evidence to be admitted. And I believe that it is necessary to tie these two lines of identification together.

ATTORNEY MOSS: Your Honor, [23] one more thing regarding substantial need. I would like to highlight—I think the Court is aware this evidence would go to what I call a second theory of the prosecution. They do have a primary theory, which is the theory that the defendant was arrested in the first trial, and that that evidence would in fact go to a second theory, so that there is a real question of substantial need under the circumstances.

THE COURT: The discussion that we have just heard, while it deals with 404B also deals with a classic situation of circumstantial evidence insofar as it is sought to demonstrate through the Tutein vehicle being lent to Mr. Dowling, the presence of Mr. Delroy Christian in the Tutein vehicle and then earlier or later, rather, a relationship between Mr. Delroy Christian and Mr. Dowling. This is classic circumstantial evidence from which inferences are sought to be drawn.

Carrying that further, the Government seeks under 404B to link not only Mr. Christian but a mask and a gun to an occurrence two weeks after the bank robbery at the home of Miss Henry. The common features that link the [24] bank robbery and the later occurrence are largely the mask and the gun, albeit a mask of different color or the like, and no evidence that the gun was the same, except that it was a small caliber handgun.

I find by clear and convincing evidence that that evidence falls well within the ambits of 404B in which we deal on a case-by-case basis with the evidence sought to be presented. Measure that end and vice versa and decide does it fit into the realm of relevance, and I find without any question that it is relevant. If Mr. Dowling was used to the use of a mask and a gun in certain endeavors and I find that it is more probative than prejudicial because I could secure whatever prejudice that might arise by pointing out to the jury that in that later instance Mr. Dowling was not convicted, in fact was acquitted of the incident. So he is certainly not on trial of anything borne of that. And for those reasons, then, I would allow the Government to, pursuant to 404B, to present evidence relating to the occurrence at Strawberry in the Henry House—home, and I will allow the Government to present evidence of the [25] Volkswagen and the presence of Mr. Delroy Christian in the area at the time of the robbery. Thank you.

We will move now to court.

(Whereupon, the following occurred in open court out of the presence of the jury)

THE COURT: Before the jury comes in this is the time fixed for me to make a ruling on three areas in which arguments and evidentiary presentations were made yesterday. The first one is the motion of the Defendant to bar the use of certain photographs that constitute one or more of an array that were used by the Department of Public Safety. I am going to allow the photographs on the grounds that they are not overly suggestive, and that any claims to that effect may be handled through cross examination and arguments.

I should also say that a more detailed order is going to be entered on each of these areas. With respect to the search, the unwarrantless search of the home of Jennifer Dowling and Reuben Dowling, I'm going to suppress any bullets or anything received in that search.

TESTIMONY OF VENA HENRY

[Transcript of 9-23-87 and 9-24-87]

• • • •

[91] ATTORNEY MARSHACK: I call Vena Henry, please, Your Honor.

ATTORNEY MOSS: Your Honor, while she is on her way, may we approach the bench?

(Side bar Conference)

[92] ATTORNEY MOSS: I just want to renew my motion based on Rule 404(b) and Rule 403.

THE COURT: I will deny the motion, but I will ask that the prosecutor make sure he carefully elicit the testimony he plans to elicit from her.

ATTORNEY MARSHACK: I will, sir.

VENA HENRY,

after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY ATTORNEY MARSHACK:

Q Good afternoon.
A Good afternoon.
Q Could you move the microphone down towards you so we can all hear you? Could you tell me your name, please?
A My name is Vena Henry.
Q Could you spell your first name for Mr. Rodriquez?
A V-E-N-A.
Q Where do you live?
A 99 Strawberry.
Q How long have you lived there?
A Eight years this year.

[93] Q Eight years this year. Were you living there on the 8th day of July 1985 in the —9:00 in the morning?

A Yes.

Q Did anything unusual happen?
A Yes.
Q Would you tell us what happened?

THE COURT: No, sir, that is too general a question. I would not permit it.

Q Did there come a time when any individual entered your house that day?
A Yes.
Q How many were there?
A Two persons.
Q Was any of them wearing anything over their head?
A One of them was wearing a mask over their face.
Q Was any of them carrying anything in their hand?
A Yes, small gun.
Q What color?
A Black silvery gun.
Q Did there come a time during that—was that the same person who was wearing the mask over their [94] head or a different person?
A The same person with the mask hand a gun.
Q Did there come a time when the mask was taken from that person's head?
A Yes.
Q Who took it from their head?
A I raise it half way and the person took it off and dump it on the table.

ATTORNEY MARSHACK: I ask that this be marked as Government's Exhibits Number 19.

THE COURT: Yes.

BY ATTORNEY MARSHACK:

Q Have you ever seen that before today?
A Can I look at it?
Q Yes, look at it.
A Yes, I do, before.

Q Was that carried away from your house when the two men left?

A No.

Q The man who was wearing that brown mask over his head do you see him in the courtroom today?

A Yes, across there.

Q What's he wearing?

A A blue shirt.

[95] Q Do you know the name of the man who was with him on that day?

A Yes, I know his name.

Q What was the name of the man who was with him?

A Delroy Christian.

ATTORNEY MARSHACK: I have nothing further of this witness.

THE COURT: Before you hear from our defense counsel, I think it is important to stress that anything arising out of that particular episode went down and Mr. Dowling was acquitted.

The purpose for which this is being brought is limited to the questions and answers the prosecutor brought. Miss Moss.

ATTORNEY MOSS: Thank you, Your Honor. Just a minute please.

ATTORNEY MARSHACK: Your Honor, I move Government's Exhibit 19 into evidence.

THE COURT: 19?

ATTORNEY MARSHACK: 19.

ATTORNEY MOSS: No questions.

THE COURT: 19 is moved.

ATTORNEY MOSS: Subject to my previous objection.

THE COURT: Received. Thank you. You are [96] free to leave or to stay.

THE WITNESS: Thank you.

(THEREUPON, the witness was excused from the witness stand.

EXCERPT FROM CLOSING INSTRUCTIONS OF DISTRICT COURT

[Transcript of 9-23-87 and 9-24-87]

• • • •

[36] When you consider credibility, you have to take into account the credibility of those persons who are making the identification. Because, it is the burden of the Government to prove not only that a series of crimes took place but that Rueben Dowling was the person who committed that crime—those crimes.

Also you heard some testimony about photographs that the police had, and they collected a number of them and put them together for line up. Well, you can't read anything into that. People—the police have a lot of photographs from a lot of people for a lot of reasons, and you can't say just because a person had a picture as part of a police file system that that person committed any crime.

Sometimes in a case [37] evidence of other incidents can be considered not to proffer the character of somebody who is accused of a crime, but it can be considered for among other reasons, to add to the evidence of identity.

In that regard, you have heard testimony from a Miss Viena Henry, contradicted and denied by Mr. Dowling that on July 20th, 1985 Mr. Dowling entered her Home wearing a face mask, carrying a small handgun in the company of Delroy Christian. That was presented to you for your consideration in the contexts, and to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. Mr. Dowling was found not guilty of the crime of robbery in connection with that.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3650

UNITED STATES OF AMERICA

v.

DOWLING, REUBEN
(D.C. Criminal No. 85-00070-01)

GOVERNMENT OF THE VIRGIN ISLANDS

v.

DOWLING, REUBEN
(D.C. Criminal No. 87-00071-01)
Reuben Dowling, Appellant

On Appeal from the District Court
of the Virgin Islands (St. Croix)

Argued April 22, 1988

Before SEITZ, SLOVITER, and BECKER,
Circuit Judges

(Opinion filed August 22, 1988)

SLOVITER, *Circuit Judge.*

Reuben Dowling, who was convicted by a jury of several offenses arising out of a bank robbery, appeals on various evidentiary grounds. Dowling contends that the trial court abused its discretion in refusing to suppress photo identifications, in refusing to allow testimony by Dowling's expert witness on human perception, and in disallowing defense questioning of a witness concerning a civil suit arising out of the robbery, and that the court erred in admitting into evidence testimony concerning a crime for which Dowling previously had been acquitted.

I.

Facts

On the afternoon of July 8, 1985, a man armed with a pistol and disguised by a ski mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix, taking approximately seven thousand dollars from two cash drawers. The robber ran from the bank to a parking lot across the street, then returned to the middle of the street and, pointing a gun, commandeered a passing taxi van. After a struggle with the taxi driver, the robber drove away in the van and took off his mask.

Antonio Messer, who had been in the bank but had managed to slip out in the course of the robbery, observed the robber's getaway. He testified that he was approximately fifteen feet away from the robber as he drove past and got a good look at the robber's face. He identified Dowling as the robber.

About a mile outside of Frederiksted, the robber drove the van into the front yard of Hayde Pichardo. Upset because her young children were playing there, Pichardo, who was observing events from her bedroom window, shouted an obscenity at the driver, getting a good look at his face when he made a full stop and stuck his out head to see who had hurled the invective at him. Pichardo's

seventeen-year-old daughter, Amada Rosario, was also in the house and was watching through the window as the driver slowed down and put his head outside. The robber subsequently abandoned the van and fled on foot. Both Pichardo and Rosario identified Dowling as the driver.

Dowling was charged by information with the federal crimes of bank robbery, 18 U.S.C. § 2113(a) (Supp. IV 1986), and armed robbery, *id.* § 2113(d) (1982), and, under territorial law, with two counts of first-degree robbery, V.I. Code Ann. tit. 14, § 1862(2) (Supp. 1987), two counts of third-degree assault, *id.* § 297(2), illegal possession of a firearm during the commission of a violent crime, *id.* §§ 2253(a), 2254, grand larceny, *id.* § 1083(1) (1964), and unauthorized use of a vehicle, *id.* § 1382 (Supp. 1986). He pled not guilty to all the charges.

Dowling's first trial ended in a hung jury. Dowling's conviction following a second trial was reversed on appeal.[1] After a third trial, Dowling was acquitted of the federal and territorial counts alleging possession of a firearm and convicted of the remaining counts. This appeal followed.

II.

The Photo Identifications

Dowling argues that the district court should have suppressed the evidence of the pre-trial identifications of Dowling by Pichardo, Rosario and Messer through several photographic arrays. He contends that the arrays were impermissibly suggestive and gave rise to a sub-

[1] We held that because there was a strong possibility that the jury had been exposed to extra-record information as to this case and Dowling's prior criminal conduct, the trial court erred in failing to develop a record sufficient to permit evaluation of the potential prejudice to the defendant. Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).

stantial likelihood of irreparable misidentification. The district court examined the photo arrays and concluded they were not suggestive.

Pichardo and Rosario were separately shown first an array consisting of five photographs, including one of Dowling that was several years old (Gov't Trial Exhibit 15). Both identified Dowling but stated that he looked younger in the photograph. Some time later they were shown an array of six photographs, none of Dowling (Gov't Trial Exhibit 11). They each said the person driving the van was not included. They were then shown an array of six color photographs containing a recent picture of Dowling (Gov't Trial Exhibit 12). Although they initially denied recognizing anyone, each identified Dowling the next day.[2]

Messer was shown the array without Dowling (Exhibit 11) and the array with Dowling's recent picture (Exhibit 12), and picked no one out of the former and Dowling out of the latter.

Dowling complains that he was wearing a red tee-shirt in that exhibit and was pictured with individuals of noticeably different builds and skin hues. However, some of the other men also wore colored tee-shirts. In all three arrays, the photographs were virtually identical in composition and quality, and the men portrayed were reasonably comparable in dress and appearance. We agree with the district court that the photo arrays were not suggestive.

A few days after a line-up, at which Pichardo, Rosario and Messer failed to identify Dowling,[3] they were sepa-

[2] At trial, they explained that they had been reluctant to get involved.

[3] Pichardo and Rosario testified they had recently seen a movie in which, in the words of Pichardo, one of the men in a line-up "jumped through the glass and the thing fall on top of them and he take the gun and shoot everybody," App. at 258, and were too

rately shown an array of photographs taken of the participants in the line-up and each picked out Dowling. Dowling contends that the process was impermissibly suggestive because his photograph was the only one repeated in the photo arrays that the principal witnesses saw prior to the line-up and prior to their viewing of the two arrays of photographs drawn from the line-up. The district court concluded that this repetition standing alone did not affect suggestiveness.

Under some circumstances, repetition of a photograph could be suggestive. However, a degree of suggestiveness does not in itself require exclusion of the evidence. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). If there was a suggestive identification procedure, the question becomes whether the suggestiveness "created 'a very substantial likelihood of misidentification.'" *United States v. Milhollan*, 599 F.2d 518, 522-23 (3d Cir.) (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)), *cert. denied*, 444 U.S. 909 (1979). This question is to be answered with reference to the "totality of the circumstances," with particular attention paid to such relevant factors as the quality of the witnesses' original opportunity to view the criminal, their degree of attention, their level of certainty when confronted with the suspect or his image, and the length of time between the crime and the confrontation. *See Neil*, 409 U.S. at 199-200; *Manson*, 432 U.S. at 114-16.

Here the witnesses all observed Dowling in good light, and had adequate, if not ample, time to form an impression. Messer, whose view was perhaps the least advantageous, made a deliberate effort to make an effective observation because, he testified, he knew he would be asked by the police for a description. Rosario and Pichardo were also more than just casual observers because Dowling was an undesirable intruder. All three witnesses were presented with photo arrays soon after the robbery, and all three identified Dowling's picture from the first array. All three picked no one from the pre-lineup array in which Dowling's photo was absent.

Against this is to be weighed the slight, and likely inadvertent, suggestiveness of the repeated use of different photographs of Dowling in succeeding photo arrays. There is no evidence that the police added in any way to the possible suggestiveness of the repetition, nor that they availed themselves of the photo arrays unnecessarily. Under these circumstances, we cannot say that there was a "very substantial likelihood of misidentification," and therefore the district court did not violate Dowling's right to due process in denying his motion to suppress.[4]

III.

Admission of Expert Testimony

Dowling contends that the district court abused its discretion in excluding the testimony of Dr. Harry Krop, who Dowling proffered as an expert on the psychological and physiological factors influencing the reliability of

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frightened at the line-up to identify anyone to the police. Rosario stated at trial that she had recognized the defendant. Messer testified that "I know that he was in there" but that he did not make a line-up identification because he was scared and because there were differences in Dowling's weight and hair-style as he appeared at the line-up and Messer's recollection of the robber.

[4] Dowling also contends that the district court abused its discretion in failing to exclude the 1979 picture of Dowling because it was described at trial as the "old" or "1979 photograph", thereby suggesting that Dowling must previously have had contact with the police. Although a different description might have been preferable, the inference that Dowling suggests the jury could have drawn is speculative. The photograph was not a "mug-shot" that was clearly identifiable as the product of an arrest, and its introduction was not reversible error. *See* United States v. Hines, 470 F.2d 225, 229 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

eyewitness identifications. The district court, following the dictates of *United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 725 (1988), and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), conducted an extensive *in limine* hearing. The court held that although Krop qualified as an expert in eyewitness identification, the testimony would not be admitted.

The court gave two reasons for its ruling. The court noted first that Dowling gave the government only five days' notice of the proposed proffer, and stated that "we are inclined to bar the testimony for this reason alone." App. at 368. In *Downing*, we stated that the trial court could consider "[t]he extent to which the adverse party has had notice of the evidence and an opportunity to conduct its own tests or produce opposing experts," 753 F.2d at 1241. The late proffer substantially prejudiced the government because, on such short notice, it could not reasonably be expected to search for its own expert and find one available to come to the Virgin Islands in time to be given the available facts and the opportunity to assimilate them. We therefore cannot hold that the district court abused its discretion in declining to admit the testimony on this ground alone.

The district court found "an additional compelling reason" to bar the testimony on the merits, concluding that the testimony would not aid the jury in reaching an accurate resolution. This, of course, as Judge Becker stated in his trailblazing opinion in *Downing*, is "[t]he touchstone of Rule 702." 753 F.2d at 1235.[8]

In *Downing*, we held that the district court should balance the general reliability of the scientific principles

[8] Fed. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

and their potential in aiding the jury against the likelihood that such information would mislead or overwhelm a jury. 753 F.2d at 1240. In addition, as Judge Becker thereafter explained in *Sebetich*, "admission depends upon the 'fit', *i.e.*, a specific proffer that the testimony will focus on particular characteristics of the eyewitness identification at issue and discuss how those characteristics call into question the reliability of the identification." *Sebetich*, 776 F.2d at 419.

The district court here recognized the "fairly established though controversial" nature of Krop's field, App. at 386, but found that "there was no testimony tying the specific data in the area of eye-witness identification to the eye-witness identifications under consideration here." App. at 386-87.[9]

From our review of the transcripts of the *in limine* hearing, in which Krop was questioned on the application of his expertise to the eyewitness, photographic and line-up identifications of the principal prosecution witnesses, Pichardo, Messer and Rosario, we find adequate support for the district court's conclusion. Krop testified that serious stress at the moment of observation usually reduces recall. Although this was arguably relevant as to Pichardo, who may have been afraid that her children were in danger or angry at the person who endangered them, Krop himself testified that Messer "probably would not have been in a high stress situation" and "would

[9] Dowling contends that the court erred in stating "that there were no scientific studies, treatises, etc. upon which Dr. Krop's testimony would be based," Appellant's Brief at 9, but our reading of the district court's opinion is different. Having reached the issue of "fit," the court had necessarily found there to be a sufficient scientific basis for Krop's testimony, and the court's statement that "there was simply no proffered proof reflecting treatises, reports, workshop results, research data or the like, *as to the possible misidentifications in this case*," App. at 387 (emphasis added), went to the lack of a connection between Krop's acknowledged expertise and the particular facts presented.

probably have a fairly good reliability for recall," App. at 53, and that it "does not sound like [Rosario] was in a high level of stress" when she viewed Dowling in the van, App. at 65.

Krop referred to the "weapon focus phenomena," App. at 33, the tendency of a person to focus more on the weapon than on the person wielding it, but there was no assertion that any of these witnesses made their observations while faced with a weapon. Similarly, Krop testified that fifteen seconds is "generally viewed as the minimal amount of time that a person has to view a situation to be able to give fairly accurate recall," App. at 48, but there was no testimony at the hearing that any of the witnesses had less than fifteen seconds in which to view the suspect; on the contrary, in the Messer and Pichardo fact-patterns presented to Krop both were said to have had thirty seconds. App. at 53, 55-56. Krop testified that reliability was impaired when the witness was younger than thirteen or fourteen or older than sixty-five, but there was no evidence that the witnesses were in those age groups.

Krop was proffered various observations on the photo array identifications, but conceded under questioning by the court that virtually all his observations on the photo arrays were based on or equivalent to those to be derived from common sense. Krop's observation that witnesses presented with a series of photo arrays in which only the suspect's photo is repeated may "recognize" the suspect in one of the latter arrays based only on his familiarity from the earlier ones is of limited value in this case because, as we noted earlier, Dowling's picture was not repeated in each of the three pre-lineup arrays. Finally, Krop did not suggest that his testimony had any particular relevance to the identifications of the post-lineup pictures; instead he stated that "in terms of the lineup . . ., it sounds like where psychological theory is more relevant would be in terms of the original . . .

perception . . . as opposed to the methodological identification during the lineup." App. at 85.

As these examples suggest, nearly all the factors Krop was prepared to testify affected witness reliability were not present in this case. Further, many of his observations were of the type no expertise was required to make. While the relevance of the testimony at least as to Pichardo's reliability is a closer issue, the district court properly applied the teachings of *Downing*, and we cannot say that its decision to bar the evidence was an abuse of discretion. *See Downing*, 753 F.2d at 1240; *see also Sebetich*, 776 F.2d at 419.

IV.

Evidence of a Witness' Prior Civil Suit

Dowling also contends that the district court erred in disallowing Dowling's questioning of Messer regarding his loss of a civil suit against the bank for recovery of money he allegedly lost in the bank robbery. Dowling argues that because the civil suit had been characterized by the judge presiding in that case as "bordering on the frivolous" and because the verdict represented the jury's rejection of Messer's claim that he left money on the counter of the bank during the robbery, this was relevant cross-examination of Messer which he should have been able to use to impeach Messer's credibility.

Under Fed. R. Evid. 608(b), the district court has the discretion to admit evidence of specific instances of conduct to impeach a witness' credibility "if probative of truthfulness or untruthfulness." *See United States v. Bocra*, 623 F.2d 281, 287-88 (3d Cir.), (review for abuse of discretion), *cert. denied*, 449 U.S. 875 (1980). The Advisory Committee Notes to Fed. R. Evid. 608(b) caution that "the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.*

In this case, the district court noted that the civil jury's decision could have been based on grounds other than disbelief in Messer, and that examination on the entire civil suit was "far too much outside of the issue." App. at 220-21. The court did allow Dowling to use previously introduced photographs of the bank during the robbery to impeach Messer insofar as he testified on direct that he left the money on the counter. The court did not abuse its discretion in holding that the danger of confusion so outweighed the probative value of the evidence as to justify barring that line of questioning.

V.

Evidence of Acts Subject to a Prior Acquittal

A.

Propriety of the Evidence

We turn finally to the most troublesome issue raised by this appeal, the court's admission of the testimony of Vena Henry, who described how a man wearing a knitted mask with cut out eyes (of a different color than the one worn by the bank robber) and carrying a small handgun (which was similar to the black silvery gun used in the bank robbery), accompanied by Delroy Christian, broke into her home in Frederiksted two weeks after the robbery, and how, in a struggle, she pulled the mask off the intruder, whom she identified as Dowling. App. at 143-44. Dowling was thereafter charged by the Government of the Virgin Islands with burglary, attempted robbery, assault, and weapons offenses, and was acquitted after a trial. App. at 147; Information, Criminal No. 85-64.

Dowling argues that the introduction of Henry's testimony was in violation of Fed. R. Evid. 404(b)[7] and

[7] Evidence of "other crimes, wrongs, or acts" may be admitted to prove, among other things, identity, but not "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b); *see, e.g.*, United States v. Milhollan, 599 F.2d 518, 524-25 (3d Cir.), *cert. denied*, 444 U.S. 909 (1979). *See generally* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[15] (1986) (discussing proof of identity through "evidence of a crime which has the same unusual features as the charged crime").

improperly prejudiced him under Fed. R. Evid. 403. Dowling relies on our decision in *United States v Keller*, 624 F.2d 1154, 1159 (3d Cir. 1980), the closest precedent in this court.

The defendant in *Keller*, who had been convicted of conspiracy to distribute a controlled substance following the jury's rejection of his entrapment defense, claimed on appeal that the trial court had erred in permitting the government to undermine his defense by questioning him about other drug transactions for which he had been prosecuted and acquitted. We reversed, holding that the doctrine of collateral estoppel barred the evidence. *Id.* at 1157-60.

In *Keller*, we referred to the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause, *see, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Venable*, 595 F.2d 71 (3d Cir. 1978), but we relied for our holding on this court's precedent, *see United States v. Simon*, 225 F.2d 260 (3d Cir. 1955); *United States v. De Angelo*, 138 F.2d 466 (3d Cir. 1943), that "consistently applied [the doctrine of collateral estoppel] to bar the evidentiary use of crimes for which the defendant has been acquitted." 624 F.2d at 1160. We quoted with approval the following statement by the Fifth Circuit:

> [i]t is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit.

Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972), *quoted in Keller*, 624 F.2d at 1160.

The government argues that *Keller* notwithstanding, the evidence was admissible in this case because the issue of Dowling's identity and his use of a knitted mask and small handgun in the Henry incident was not determined in his favor by the acquittal verdict. It cites as legal authority a district court opinion in *United States v. Hill*, 550 F. Supp. 983 (E.D.Pa. 1982), *aff'd mem.*, 716 F.2d 893 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984), which it states holds that *Keller* is only applicable where the evidentiary fact sought to be introduced in a subsequent trial "has been actually determined in defendant's favor in the trial which resulted in defendant's acquittal." Appellee's Brief at 22. That is not what *Hill* held.

In *Hill*, the defendant, who had been tried at his first trial on seven counts, was acquitted on two and found guilty on five. After this court reversed and remanded for a new trial on those counts, defendant was again found guilty. Obviously, as the district court there noted, evidence in support of the five counts on which Hill was previously found guilty was not precluded by our opinion in *Keller*. 550 F. Supp. at 988. The court further determined that even if it was error to admit evidence of the distribution for which Hill was acquitted, it was harmless beyond a reasonable doubt. *Id.* at 988-89. Nothing in *Hill* puts the gloss on *Keller* that the government argues.[8]

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[8] Moreover, in *Keller* we rejected a virtually identical argument to that made by the government here, saying:

> The Government argues . . . that . . . Keller did not deny the fact of his participation in the drug distributions but claimed that he was excused from criminal prosecution because he was entrapped. The Government contends that collateral estoppel is inapplicable because "[i]t is not the *result* of the prior case that was material, but rather the *facts* which were undisputed." Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law. We decline to so hold since that would eviscerate the effect of the prior acquittal.

Keller, 624 F.2d at 1160 (citations omitted); *accord* Blackburn v. Cross, 510 F.2d 1014, 1017 (5th Cir. 1975) ("there is no difference between relitigating an ultimate fact or an evidentiary fact: relitigation of either is prohibited" by doctrine of collateral estoppel); *see also* United States v. Crispino, 586 F. Supp. 1525, 1530-32 (D.N.J. 1984).

Nor is there any evidence to support the government's premise that the issue of Dowling's identity and his use of the knitted mask and small handgun was not determined in his favor by the acquittal. No extrinsic evidence of the record in the earlier case against Dowling was introduced. Apparently, the same trial judge presided in both. The following colloquy in this case is the only light shed on the events in the other:

> [ASS'T U.S. ATTORNEY]: Your Honor, having the case described to me—I wasn't here—but the Defense in the case presented, not through Mr. Dowling but through his co-defendant Delroy Christian, it was not a robbery. The two of them merely came to retrieve from an individual in the house money from an individual in the house.
>
> THE COURT: Mr. Dowling's presence in the house was not seriously contested in the case *but he stated the general defense.* Mr. Dowling, I don't think, took the stand.

App. at 154 (emphasis added).

This is an insufficient basis on which to conclude that the issue of Dowling's participation in the robbery was not determined. Since Dowling entered a new guilty plea and did not testify, the government was required to prove all the elements of the case against him beyond a rea-

sonable doubt. His co-defendant's explanation imposed no burden on him. Even assuming that Dowling's identity and presence in Henry's house were not specifically disputed, we believe that the government cannot legitimately assert that evidence concerning one element of an offense is separable for evidentiary purposes from a jury's general verdict of acquittal merely because it was not directly contradicted.[9]

Even apart from *Keller*, we believe the evidence in this case was inadmissible. The Supreme Court has recently had occasion to consider the operation of Fed. R. Evid. 404(b) in *Huddleston v. United States*, 108 S. Ct. 1496 (1988) (holding that a federal district court need not find that the government has proven the similar act by a preponderance of the evidence before it is admissible under Rule 404(b)). The Court stated that, "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at 1501. It follows that when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude "that the act occurred and that the defendant was the actor."

Even if the *Huddleston* analysis would not, of itself, exclude as irrelevant all acts which were the subject of a prior acquittal, in this case the evidence of pattern on which the district court relied was at best tenuous. The district court held that the evidence of the Henry incident "falls well within the ambit" of Rule 404(b) because "the common features that link the bank robbery

[9] This issue is distinguishable from that which arises when a defendant has been acquitted on one count of a multi-count indictment and is being retried on other counts. Courts have held that acquittal on one charge arising out of a set of facts does not preclude the use of the same evidence to prove a second charge on retrial. *See* United States v. Gentile, 816 F.2d 1157, 1164 (7th Cir. 1987). We express no view on that issue.

and the later occurrence are largely the mask and the gun, albeit a mask of different color or the like, and no evidence that the gun was the same, except that it was a small caliber handgun." App. at 159-60.

The balance required by Fed. R. Evid. 403 necessitates a consideration of prejudice as well as probative value. In *United States v. Beechem*, 582 F.2d 898 (5th Cir. 1978) (in banc), *cert. denied*, 440 U.S. 920 (1979), approvingly cited in *Huddleston*, 108 S. Ct. at 1501, the court pointed out that "[o]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for extrinsic offense." 582 F.2d at 914. The court continued, "[t]his danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." *Id.*

When the limited similarity of the alleged offense behavior in the bank robbery and the Henry incident is coupled with the fact that the jury's verdict in the Henry occurrence must be taken to signify that it was not proven that Dowling committed the "bad" act charged (either because it was not Dowling or it was not a robbery), the marginal relevance of the evidence was more than amply outweighed by the potential prejudice. *See United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968). We thus conclude that in addition to being inconsistent with *Keller*, the admission of the Henry testimony was an abuse of discretion.

B.

Effect of the Error

A new trial is necessary only if the error in admitting the evidence was not harmless. We need not in this case be convinced that the error was harmless beyond a reasonable doubt. In *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1899

(1987), this court held that when the challenged instruction did not affect a constitutional right, "we must apply the 'highly probable' standard of appellate review to determine the harmlessness of the error." *Accord Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). We explained further that, "'[h]igh probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant' but need not disprove every 'reasonable possibility' of prejudice." *Grayson*, 795 F.2d at 290 (citing *United States v. Jannotti*, 729 F.2d 213, 219-20 & n.2 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984)).

The putative prejudice flowing from the admission of Henry's evidence is that it influenced the jury's conclusion that Dowling was the masked robber. However, as the district court stated at sentencing, the evidence was "overwhelming". Sentencing Transcript at 16. In this case, there were three positive identifications, Messer testified that he had "a clear recollection in [his] own mind of what the face of the man looked like" who ran from the bank and removed the mask from his head. App. at 201. He testified that it was a clear day and he had a clear view of what was going on. App. at 197-98. He stated that as the man passed him, "I knew I was trying to identify somebody, looking for a feature or face or something like that, because I know I would have to say something to the police officials or give a description or something like that." App. at 197.

Pichardo was equally certain in her identification of Dowling as the man who drove into her yard.[10] She stated, in identifying Dowling in the courtroom, "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks." App. at 249. Rosario also gave a positive identification of Dowling at the trial. Messer not only saw the robber take off his mask, but pursued the taxi van in his own vehicle to where the van was abandoned near Pichardo's home in Estate Smithfield. This forges an iron link between the eyewitness accounts of the robbery and the identifications of the van's driver by Pichardo and Rosario. Finally, as we discussed above, each of the eyewitnesses identified Dowling through various photographic arrays shown to them shortly after the robbery.

[10] The defense brief concedes that the man who drove into the Pichardo yard was the bank robber.

There was other strong evidence. Messer testified that the robber was tall, fit and clad in a green army shirt, a description that was corroborated by numerous witnesses. Bank employees Williams, Sanes, Austin, Moorehead and Santiago all remembered the robber wore a green army shirt, several of them also testifying that he was athletically built and six feet or more tall. Bank customer Fabio also testified that the robber was an athletically built man, about 6' 1" tall, wearing a green shirt. A Special Agent of the F.B.I., who had used the bank security photographs of the robbery to estimate the robber's height, testified that he was probably at least 6 feet tall. Of course, the jury was able to judge for itself whether this description matched Dowling's physique.

The government also presented a strong circumstantial case hinging on the robber's haphazard getaway. The government's theory presented to the jury was that it was unlikely that a robber who took pains to conceal his face with a mask and who wore gloves to avoid fingerprints would have no better getaway plan than to hijack a taxi. Numerous witnesses testified that the robber had run around outside the bank after the robbery apparently looking for something. The government posited that the robber's original plan to leave by a getaway car had been foiled while he was in the bank.

The government presented the testimony of several witnesses to support this theory and to connect Dowling to the crime. Philip Tutein testified that Dowling had bor-

rowed a white Volkswagen a day or two before the robbery. Anthon Christian, a police official, testified that on the morning of the robbery, he noticed a white Volkswagen stalled on a road occupied by a man wearing a green army shirt and the same kind of hat from which the robber's mask was made, and that he noted the license number of the car, which was later identified as Tutein's. Police sergeant Anita Christian testified that at about the time of the robbery, she was patrolling in town and saw a white Volkswagen parked at a spot later described as near the bank. The front door of the car was open and it was occupied by two persons, one of whom was her cousin Delroy Christian. She asked the driver to close the door, and the car then drove off and out of town. Dowling himself testified that he knew Delroy Christian. He also admitted borrowing Tutein's white Volkswagen and was unable to proffer any evidence as to where he was on July 8.

Of course, we cannot entirely discount the possibility that there may have been some prejudice to Dowling by the introduction of Henry's testimony which, if credited, implicated Dowling in a prior bad act. Also, the government in its closing statement pointed to Henry's identification of Delroy Christian as accompanying Dowling, which could be seen as supporting the government's theory of the getaway car.

However, our standard on harmless error applicable here is not one of certainty of no prejudice, but one of "high probability". In that connection, we note that the district court did caution the jury in its general instructions as to the limited value of the Henry testimony. The court stated that the Henry testimony "was presented to you for you to consider in the contexts, and to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. Mr. Dowling was found

not guilty of the crime of robbery in connection with that." Supp. App. at 29. The prosecutor also pointed in his closing to the limited purpose for which the Henry evidence was admitted, and defense counsel stressed Dowling's acquittal in her opening statement to the jury.

Moreover, when Dowling testified in his own defense, he stated that he was acquitted in the Henry incident charge but admitted that he had been convicted of another bank robbery in 1979.[11] In light of that testimony, which was properly admitted, it is unlikely that the admission of the Henry testimony more than marginally affected the jury's overall character assessment of Dowling.

There are instances in which the erroneous admission of prior bad acts evidence will not be harmless. Evaluation of the prejudice occasioned by a trial error is a fact-specific process. In light of our review of the entire record, we conclude that there is a "high probability" that the error in admitting the Henry testimony did not prejudice Dowling. *See United States v. Ezzell*, 644 F.2d 1304, 1306 (9th Cir. 1981) (where three eyewitnesses to bank robbery identified defendant and he was photographed by the security camera, error in admitting evidence of prior bank robbery was harmless).

VI.

For the reasons set forth above, we will affirm the judgment of conviction.

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[11] Instructing on impeachment, the court stated: "[O]ne of the ways in which impeachment evidence is permitted is if a person testifies then that person may be demonstrated to have had a prior felony conviction and that that happened in this case when Mr. Dowling exercised his rights to take the stand and testify under oath. Then it was permitted to be shown that in 1979 he was convicted of the felony of bank robbery." Trial Transcript, September 24, at 38.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3650

UNITED STATES OF AMERICA

v.

REUBEN DOWLING, ETC.,
Appellant

SUR PETITION FOR REHEARING

Present:

GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by Appellant, Reuben Dowling in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ K. Shorter
Circuit Judge

Dated: September 28, 1988

SUPREME COURT OF THE UNITED STATES

No. 88-6025

REUBEN DOWLING,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

February 27, 1989

FILED
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING

Petitioner,

v.

UNITED STATES

Respondent.

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Does the due process clause of the Fifth Amendment bar evidence against a defendant in a criminal case of unrelated criminal conduct, introduced pursuant to Federal Rule of Evidence 404(b), where the defendant has previously been tried and acquitted of such offense?

2. Was the admission of evidence of unrelated criminal conduct against the defendant in this case barred by collateral estoppel principles embodied in the double jeopardy clause of the Fifth Amendment where the defendant had previously been tried and acquitted for such offense?

3. Assuming the introduction of the evidence in this case was in violation of either the due process or double jeopardy clauses of the Fifth Amendment, was the error harmless within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported as *United States* v. *Dowling*, 855 F.2d 114 (3d Cir. 1988) (J.A. 31-49). A Petition for Rehearing was denied on September 28, 1988 and is unreported. (J.A. 50).

JURISDICTION

The jurisdiction of this Court arises under Title 28, United States Code, Section 1254(1). The petition for a writ of certiorari was granted on February 27, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fifth Amendment to the United States Constitution provides in relevant part that:

> [No person shall] be deprived of life, liberty, or property, without due process of law;

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

18 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52(a), Federal Rule of Criminal Procedure, provides:

> Rule 52. Harmless Error and Plain Error:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

A. Proceedings In The District Court.

At approximately 2:15 P.M. on July 8, 1985 a lone gunman entered the First Pennsylvania Bank in Frederiksted on the island of St. Croix in the U.S. Virgin Islands. (Tr. 9-22: 92,95).[1] Wearing a dark woven mask with holes cut out around the eyes and carrying a black small caliber gun, the gunman, after ordering no one to move, jumped a counter and went from teller to teller demanding the cash drawers be emptied. (Tr. 9-22: 95,98,100-103,118-119,124,159). Placing the money in a small brown paper bag, the robber exited the bank through a side door. (Tr. 9-22:108,124,159). Approximately $7,800 was taken in the robbery. (Tr. 9-22: 156-157).

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[1] The original transcript filed with the Court of Appeals in this case consisted of five volumes. These volumes are not labelled sequentially but by the date of the proceedings contained therein. Thus, references to the volume dated 9-21-87 are abbreviated (Tr. 9-21:____); volume dated 9-22-87 (Tr. 9-22:____); volume dated 9-23-87 and 9-24-87 (Tr. 9-23 & 24:____); second volume dated 9-23-87 and 9-24-87, containing closing instructions (Inst. ____); volume dated 9-23-87 (Tr. 9-23:____). This latter volume contains only the transcript of petitioner's testimony and of the closing argument. These parts of the transcript were not originally forwarded to the Court of Appeals. They were transcribed later at that court's request and placed in the same volume. When the original joint appendix was prepared in this case counsel was not in possession of this latter volume. The parts of this volume considered most appropriate for inclusion in the appendix have been attached hereto in the form of a supplemental appendix and are abbreviated when referenced, as (Supp. App. ____).

On August 22, 1985 two Informations[2] were filed in the District Court of the Virgin Islands charging petitioner with various offenses stemming from the robbery of the First Pennsylvania Bank. (J.A. 1).[3] Petitioner's first trial on the consolidated Informations was held in November 1985. A mistrial was declared after the jury was unable to reach a verdict. (J.A. 1). Petitioner's retrial commenced on March 31, 1986. On April 2, 1986 a jury found petitioner guilty of various offenses arising out of the robbery of the First Pennsylvania Bank. (J.A. 1). The United States Court of Appeals for the Third Circuit subsequently reversed the conviction after finding that petitioner's trial jury had been improperly exposed to prejudicial extra-judicial information. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134 (1987). Petitioner's third trial commenced on September 22, 1987. A jury again returned a verdict finding petitioner guilty of several offenses relating to the bank robbery. (J.A. 2). Petitioner was sentenced to a total of seventy years incarceration on all counts. (J.A. 12-14).

The Government relied on both eyewitness and circumstantial evidence to establish that petitioner was the

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[2] Violations of local law may be prosecuted in the District Court of the Virgin Islands by Information, except where local law requires otherwise. 48 U.S.C. Section 1561 (1987); 1 V.I.C., Revised Organic Act of 1954, Section 3 (Supp. 1988).

[3] In Information No. 85-70 the United States charged petitioner with the robbery of a federally insured bank in violation of Title 18 U.S.C. Section 2113(a) and in count two with commission of the same robbery with a gun in violation of subsection (d) of Section 2113. In Information No. 85-71 the Government of the Virgin Islands charged petitioner with armed robbery and various assault and firearms offenses resulting from the robbery of the First Pennsylvania Bank, as well as unlawful possession of stolen property in connection with the theft of a taxi van used to escape the scene. App. 3-11.

masked gunman who entered the First Pennsylvania Bank. While able to provide a general description of the robber in terms of dress and build,[4] none of the five bank employees called by the Government was able to identify the petitioner.[5]

The only identification testimony provided by someone in the bank at the time of the robbery was that given by Antonio Messer, who was standing in line waiting to see a teller when the robber entered the bank. (Tr. 9-22:187). While the robbery was still in progress Messer exited the bank. (Tr. 9-22:188,221-222). Messer proceeded across the street to his car. Unable to find his keys, he took cover behind a pillar in front of a nearby building. (Tr. 9-22:189-190). From this location he was able to see the robber running around outside in the street in front of the bank. (Tr. 9-22:190). Messer observed the robber, gun in hand, running towards a taxi van that was slowing moving down the street. The robber struggled with the driver and then commandeered the van with the driver exiting the vehicle. (Tr. 9-22:190-193,223). The van, with the robber now driving, slowly proceeded in the direction of Messer. While the van was leaving, Messer saw the robber begin removing his mask from his face. (Tr. 9-22:193). Based on the three to four seconds he had to view the

[4] Various witnesses described the robber as tall (Tr. 9-22:97,152), muscular or well-built (Tr. 9-22:98,120,152), and wearing a green army shirt (Tr. 9-22: 98,120,147), jeans or dark pants (Tr. 9-22:111,120), white sneakers (Tr. 9-22: 111,157) and the mask referenced above.

[5] The five employees called by the Government were Irma Williams (Tr. 9-22:92-116), Isabel Sanes Abino (Tr. 9-22:117-122), Judith Austin (Tr. 9-22:122-126), Gladys Moorehead (Tr. 9-22:115), and Ana Santiago (Tr. 9-22: 151-157).

robber as the mask was being removed in the passing vehicle, Messer identified petitioner. (Tr. 9-22:198,224).[6]

After the van passed the pillars, Messer, suddenly able to find his keys, jumped in his car and took off in pursuit. Losing sight of the van, Messer asked an individual on the street the direction taken by the vehicle. Proceeding to search in the general area directed, Messer saw the van parked on the side of the road. Messer then returned to the bank, informing the police where he had seen the parked van. (Tr. 9-22:196).

While Messer was the only witness inside the bank at the time of the robbery able to identify petitioner, the Government did offer two other witnesses who identified petitioner as the individual driving the commandeered taxi van shortly after the robbery. Hayde Pichardo and her then seventeen year old daughter, Amado Rosario, lived in the Smithfield section of St. Croix just outside Frederiksted. (Tr. 9-22:242). On the afternoon of July 8th, shortly after the bank robbery, Pichardo and Rosario were in their home when they heard a loud noise. Looking through open window louvers they observed a taxi van

[6] Messer's testimony concerning the robber's actions outside the bank was corroborated by Vernon Fabio and Maurice Hamilton. Fabio, who also had been in the bank at the time of the robbery, hid behind a pillar outside and observed the robber commandeer the taxi van. Fabio also saw the robber removing the mask (from his chin to the forehead area) as he slowly drove past the pillar area where Fabio, and apparently Messer, were standing. (Tr. 9-22:158-161,165-167). Hamilton, the driver of the taxi van, related how a masked man with a gun approached his slowly moving van and pulled him from the driver's seat. (Tr. 9-22:173-174). Neither Fabio nor Hamilton were able to identify petitioner.

approaching the front yard at a high rate of speed.[7] Pichardo, upset because of the reckless manner in which the vehicle was being driven, hollered at the driver from inside her house, calling him a "son of a bitch." In response the driver stuck his head out the window of the van. (9-22:242;9-23&24:4-5). Both Pichardo and Rosario identified the same taxi van as that previously identified as having been commandeered in front of the bank. Both also identified petitioner as the driver of that vehicle. (Tr. 9-22:245-246;9-23&24:16).

The identification testimony of Messer, Pichardo, and Rosario was vigorously contested by the petitioner. This attack was based primarily on the limited amount of time available for the observations, the limited view, the stressful circumstances existing at the time, and the fact that each of these witnesses had failed to identify the petitioner during one or more pretrial identification procedures. See generally (Tr. 9-22: 218-35 (Messer); 257-75 (Pichardo); Tr. 9-23: 16-33 (Rosario)).

Unable to produce any physical evidence[8] and faced with somewhat less than compelling identification evidence[9] the Government sought to connect petitioner to

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[7] Pichardo and Rosario testified almost identically concerning the circumstances surrounding their observations that afternoon. Conspicuously they also gave almost identical testimony relating to their reason for failing to make a pretrial identification of the petitioner at a lineup. (Tr. 9-22: 254-56, 265-69 (Pichardo); Tr. 9-23 & 24: 13-15, 25-30 (Rosario)).

[8] Neither the gun nor mask used or the money taken by the robber were apparently recovered.

[9] The Government attempted to bolster the identification evidence by showing that petitioner was approximately the same height and build as the masked gunman. Witnesses in the bank had described the robber as "tall" (Tr. 9-22:97,152) with estimates of approximately

the robbery of the First Pennsylvania Bank by utilizing Federal Rule of Evidence 404(b) which allows evidence of "other crimes, wrongs, or acts" where relevant to prove, among other things, identity. Thus, the Government sought to show that approximately two weeks after the bank robbery petitioner had gone to the home of Ms. Vena Henry with a mask and gun in order to commit robbery. Petitioner had previously been tried in connection with the Henry robbery and acquitted. See generally (J.A. 15-28).

In order to set the stage for the Henry testimony the Government called Phillip Tutein and police officer Anita Christian. Tutein, a friend of petitioner, testified that he had lent petitioner his white Volkswagon on either July 7th or July 8th. (Tr. 9-23&24:37-39).[10] The Government sought to tie both the white Volkswagon and Vena Henry evidence to the bank robbery through the testimony of officer Anita Christian. Officer Christian was patrolling in the town of Frederiksted during the afternoon of July 8th. At approximately 2:15 to 2:30 P.M. she and her partner observed a white Volkswagon parked on the side of the street. (Tr. 9-23&24:52-53).[11] Noticing the door of the

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6'1" (Fabio) to 6'2" (Williams). An FBI agent testified that he was able to conclude from an examination of the bank surveillance cameras that the robber was at least 72 inches tall. (Tr. 9-23&24:107-108). The probative value of this evidence, while limited, was further attenuated by numerous qualifications and assumptions. (Tr. 9-23&24:101-109).

[10] Tutein initially testified that he had lent petitioner the car during the "summer" of 1985, but could not recall the date. However, Tutein admitted he had told police officer Zurita on July 9th that he had lent the white Volkswagon to petitioner a "day or two" prior to that date. (Tr. 9-23&24:39).

[11] The record does not reveal the distance from the area where the car was parked to the First Pennsylvania Bank.

Volkswagon was open in the direction of the traffic the officers stopped and requested the occupants to close the door. A "clear" skinned person was in the driver's seat and Officer Christian's cousin, Delroy Christian, was in the back seat. (Tr. 9-23&24:53-54). After Delroy and Officer Christian exchanged waves, the Volkswagon slowly pulled off heading north out of town. The police officers followed for approximately a mile and then turned around. While heading back into town the officers received a radio transmission alerting them to the robbery at the First Pennsylvania Bank. (Tr. 9-23&24:53-54,56).

The Tutein-Anita Christian evidence was offered by the Government for two purposes. First, relying on evidence that upon leaving the bank the robber ran around as if looking for someone (Tr. 9-22:92,125,190) and the argument that a robber who had taken pains to wear a mask and gloves was unlikely to leave his getaway unplanned (Tr. 9-23:29), the Government's theory was that the individuals in the white Volkswagon, allegedly the Tutein vehicle, were driving the getaway car, but that the plans had been stymied by the officers' sighting them in the vicinity. According to the Government's theory, the sudden, unplanned departure of his accomplices having left him with no means of escape, the robber had to forcibly appropriate the taxi van.[12] Second, the evidence connecting the petitioner to the Tutein vehicle and thereby to Delroy Christian was offered in an attempt to bolster the relevance of the Vena Henry testimony.

Prior to trial the Government moved the court *in limine* for a ruling allowing Ms. Henry to testify that approximately two weeks after the First Pennsylvania robbery, a

[12] App. 17-21.

masked intruder, in the company of Delroy Christian, entered her home. According to Ms. Henry the intruder was wearing a mask with holes cut out for the eyes and was carrying a small handgun. While in the house a scuffle ensued and Ms. Henry, a lady "at that time at least in her fifties" (A. 18) pulled the mask off the intruder, thereby recognizing petitioner. (A. 17-18).[13] The Government had not attempted to introduce this evidence at either of petitioner's first two trials. (A. 16). Citing Federal Rule of Evidence 404(b) and relying on the use of a mask with holes cut out for the eyes[14] and a small handgun in both robberies, the Government argued the evidence should be admitted on the issue of identity. (A. 18-21). Defense counsel pointed out that the petitioner had been previously tried for the Henry robbery and acquitted and for that reason alone the evidence should be excluded. Defense counsel further argued that the Government had failed to show sufficient unique similarities between the

[13] The facts as stated are those proferred to the court by the government in argument on the motion to admit the evidence. (App. 18-19). In its opening statement the government mentioned these same facts, including a reference to the fact that petitioner had been acquitted in connection with the Henry robbery. (Tr. 9-22:64-65). During her testimony in front of the jury Ms. Henry made reference to the mask, gun, and the fact that she "raised" the mask from the intruder's face, without specifically referring to the details of the "struggle" or the robbery. (App. 38-41). However, the jury was undoubtedly knew that a robbery had allegedly taken place at the Henry home, given the circumstances related in the Henry testimony, and the specific references to the Henry robbery in the opening statement of the Government (Tr. 9-22:64-5), closing argument of defense (Tr. 9-23, 67), and in the instructions of the court. (App. 29).

[14] The Government conceded that the same mask was not used in the Henry and First Pennsylvania robberies, as they were different colors. (App. 19, 27-8).

Henry and First Pennsylvania robberies to justify admission on the issue of identity under Rule 404(b). (App. 21-23). The district court found the Henry evidence "more probative than prejudicial" and that any prejudice could be minimized "by pointing out to the jury that in that later instance [the Henry robbery] Mr. Dowling was not convicted, in fact was acquitted of the incident." (App. 25). The district court did so inform the jury both at the time of Ms. Henry's testimony (App. 28) and in the general instructions at the conclusion of the case. (App. 29).

B. The Decision Of The Court Of Appeals.

On appeal to the United States Court of Appeals For the Third Circuit petitioner argued that the admission of the Henry evidence was error entitling him to a new trial. The Third Circuit agreed with petitioner that the evidence was erroneously admitted, relying on prior circuit precedent as announced in *United States* v. *Keller*, 624 F.2d 1154 (1980). While recognizing the "constitutional doctrine of collateral estoppel" and that language in *Keller* could be read as endorsing the constitutional underpinnings of collateral estoppel as applied in criminal cases, the court, without further elaboration or clarification, held that the admission of the evidence was error in light of the common law collateral estoppel principles of *Keller*, without reaching the constitutional issue. *United States* v. *Dowling*, 855 F.2d 114 (1988) (App. 31-49).[15]

[15] As an alternative ground, the Third Circuit held that the Henry evidence should not have been admitted through a straight application of the probative-prejudice balancing test required by Federal Rule of Evidence 403. The court noted the "limited similarity" between the bank robbery and Henry incidents and that the acquittal in the latter weighed heavily in favor of exclusion under this analysis. (App. 44-45). In its response to the petition for writ of certiorari, p. 11, n. 5, the government contends the Third Circuit's alternative ruling on this ground was also erroneous. While agreeing with the Third Circuit's analysis, petitioner submits that it is not necessary for the Court to reach that issue, as it is agreed that if the evidence was inadmissible through a straight-forward application of the provisions of Rule 403, and not in violation of the Constitution, the Third Circuit employed the proper harmless error analysis.

The court then considered the issue as to whether the admission of the Henry evidence was harmless error. Stating that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right, the court then applied its "high probability" standard of harmless error review. *Id.* at 123. (App. 46). This standard required that the court have a "sure conviction that the error did not prejudice the defendant but need not disprove every reasonable possibility of prejudice." *Id.* The court then proceeded to review the evidence and, while not "entirely discount[ing]" the prejudice to petitioner, ruled that the high probability standard had been met and that a new trial was not required. *Id.* at 124.

Petitioner filed a timely petition to rehear and suggestion for rehearing en banc, contending that the court had applied the wrong standard of harmless error review. Petitioner argued that the erroneous admission of the Henry evidence was a violation of the due process and/or double jeopardy clauses of the Fifth Amendment and that consequently this court's decision in *Chapman* v. *California*, 386 U.S. 18 (1967) required that the reviewing court be convinced beyond a reasonable doubt that the error did not affect the proceedings before disregarding the same. The petition to rehear and suggestion for rehearing en banc was denied without opinion. (App. 50).

The petition for writ of certiorari filed on behalf of the petitioner was granted by this Court on February 27, 1989.

SUMMARY OF ARGUMENT

The threshold issue presented is whether the admission of the evidence concerning the Henry robbery constituted double jeopardy or deprived the petitioner of his right to due process within the meaning of the Fifth Amendment of the United States Constitution. If so, a further issue is presented as to whether the admission of such evidence was harmless beyond a reasonable doubt under the facts of this case.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970) this Court held that collateral estoppel was an "established rule of federal law [and] is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445. The defendant Ashe was accused of robbing six participants in a poker game. Ashe was initially tried for the robbery of only one of the poker players. His defense was that he was not the robber. He was acquitted. The State of Missouri then tried him for the robbery of a second participant in the poker game. After being found guilty, Ashe petitioned for a writ of habeas corpus. This Court held that after his acquittal in the first trial the double jeopardy clause of the Fifth Amendment[16] barred the State of Missouri from further prosecution of Ashe in connection with the robbery of any of the remaining poker players. Since identity had been the issue implicitly determined in the first trial Ashe could not be forced to again defend against the allegation that he was the individual who robbed the poker game

[16] *Benton* v. *Maryland*, 395 U.S. 784 (1969) held the double jeopardy provision of the Fifth Amendment applicable to the states.

even though his trial for allegedly robbing the second poker player would be for a distinct crime.

The fundamental double jeopardy issue presented in this case is whether the preclusive principles of *Ashe* apply when the Government seeks to introduce evidence of other crimes pursuant to Federal Rule of Evidence 404(b) and the defendant has previously been acquitted of such conduct. In these situations the acquittal did not determine an "ultimate" fact or a necessary element of the new offense, as the situation presented in *Ashe*.[17] The acquitted conduct merely involves "evidentiary" facts which the Government seeks to prove in a subsequent prosecution.

The issue as to whether evidence concerning acquitted conduct may be adduced in a subsequent prosecution has divided the circuit courts of appeal. Several circuits exclude such evidence on constitutional grounds. See cases cited in Section I-B of the Argument. These decisions usually rely on the double jeopardy clause, holding the principles of *Ashe* equally applicable to the proof of evidentiary facts involving acquitted conduct, though the opinions often have a distinct due process overtone. For instance see *United States* v. *Mespoulede*, 597 F.2d 329, 330 (2nd Cir. 1979) ("constitutionally rooted considerations of fairness."); *Wingate* v. *Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972) ("fundamentally unfair . . . and incongruous with our basic concepts of justice."). Other circuits take the approach, such as that followed by the Third Circuit in this case, that such evidence is excluded through application of common law collateral estoppel principles without deciding the constitutional issue. Argument, Section I-B, *infra*. Still other decisions admit

[17] See footnote 29 *infra*.

the evidence without discussion of the collateral estoppel issues if the evidence is otherwise admissible under F.R.E. 404(b). Argument, Section I-B, *infra*. Though the majority admit prior acquitted conduct evidence the state courts have also been divided in their approach. See generally Annotation, *Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934.

Petitioner initially argues that the due process clause of the Fifth Amendment bars the prosecution from introducing evidence of other offenses for which the defendant has previously been acquitted, regardless of the basis of the acquittal. While the Government, in its response to the petition for the writ of certiorari, p.14, n. 8, dismisses the due process argument as being contrary to *Hoag* v. *Jersey*, 356 U.S. 464 (1958), the petitioner respectfully suggests otherwise. The primary due process question presented in *Hoag* was whether this provision of the constitution mandated joinder in a single trial of separate offenses arising out of the same transaction.[18] This is clearly distinguishable from the due process question presented in this case.

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[18] In its statement suggesting the inapplicability of *Hoag*, the Government makes reference in that decision to the statement expressing "grave doubts whether the collateral estoppel can be regarded as a constitutional requirement," *Id.* at 471, a view subsequently repudiated in *Ashe* v. *Swenson*. A second due process question presented in *Hoag* was whether collateral estoppel was a component of due process. Since *Ashe* later held collateral estoppel to be within the ambit of double jeopardy protection, the ruling in *Hoag* in this regard is immaterial. Petitioner's due process argument does not depend on any collateral estoppel analysis. Indeed, as discussed below petitioner contends that basic fairness requires the exclusion of such evidence on due process grounds without an attempt to wade the often murky waters of collateral estoppel analysis.

The exclusion of such evidence is consistent with several goals of the criminal justice system some of which have been given explicit due process protection. The prior acquittal at a minimum raises questions as to the reliability of such evidence. The risk that an innocent defendant may suffer serious adverse consequences is also unacceptably increased when he is called upon to again defend. Further, if the second jury draws the inference the Government requests, the admission of such evidence constitutes a judicial invitation to undesirable inconsistency, a consideration not present in the necessarily tolerated single-trial inconsistent verdict cases. Such a procedure only undermines the important public interest in the reliability of the adjudicatory process.

The admission of acquittal evidence is also inconsistent with commonly accepted notions of fair play and contrary to a "principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). That tradition is that a person tried and acquitted of a crime should not again be forced to defend that accusation in a subsequent criminal proceeding. The resource advantage possessed by the government in a normal case is unconscionably compounded when a defendant is again forced to defend. Finally, while not determinative, petitioner contends that a due process rule has the advantage of easy application, freeing the courts from the difficult and at best speculative, at worst result—oriented, process of attempting to determine, with little concrete evidence, the often indecipherable motivation behind the unitary judgment of a collective body of twelve who perhaps reached the same result applying different reasoning.

In a second argument petitioner contends that if prior acquittal evidence is not barred across-the-board on due

process grounds, then in this case the Vena Henry evidence was admitted in violation of the collateral estoppel —double jeopardy principles of *Ashe* v. *Swenson*, *supra*. This argument requires the Court to answer the threshold inquiry as to whether the principles of *Ashe* apply to the situation where the Government is not reprosecuting for a separate offense arising out of the same factual scenario but is attempting to introduce evidence of acquitted conduct at a subsequent trial. Petitioner suggests that the numerous cases holding that there is no reasoned distinction between the two situations are correctly decided. Traditional double jeopardy—collateral estoppel principles such as the protection of litigants from the burdens of relitigation, the particular double jeopardy interest in sparing a criminal defendant the concerns and burdens of being forced to undergo a second trial for acquitted conduct, and the interest in judicial economy all support the argument that *Ashe* equally applies in cases such as that presented here.

Finally, in applying the collateral estoppel analysis to attempt to determine the basis of the acquittal in the Henry case, petitioner suggests that although the record is not clear, in that it does not contain a transcript of the prior trial, nonetheless the purported explanation for that acquittal offered by the Government Flies in the face of *Ashe's* admonition against "hypertechnical" approaches in the attempt to reconstruct the basis of the prior verdict, and runs afoul of *Ashe's* injunction that such determinations be made with "realism and rationality." *Id.* at 444.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS EVIDENCE OF UNRELATED CRIMINAL CONDUCT, INTRODUCED PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B), WHERE THE DEFENDANT HAS PREVIOUSLY BEEN TRIED FOR SUCH CONDUCT AND ACQUITTED

While the decisions of the circuit courts of appeal excluding evidence of acquitted conduct normally rely on the double jeopardy-collateral estoppel principles announced in *Ashe*, the decisions often are couched in terms of fundamental fairness required by the due process clause. Thus, in deciding that such evidence must be excluded in *United States* v. *Mespoulede*, 597 F.2d 329,334 (2nd Cir. 1979) the court noted that "we are guided not only by precedents bearing on the technical question this case raises, but, in addition, by fundamental considerations of fair play." In *Wingate* v. *Wainwright*, 464 F.2d 209 (1972) the Fifth Circuit voiced similar considerations:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. *Id.* at 215.

Several state cases have excluded such evidence on due process grounds. See *State* v. *Wakefield*, 278 N.W. 2d 307 (Minn. 1979); *State* v. *Little*, 350 P.2d 756 (Ariz. 1960); *State* v. *Perkins*, 349 So.2d 161 (Fla. 1977).[19] In *Wakefield*

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[19] In *Perkins* the defendant's double jeopardy/collateral estoppel claim was expressly rejected because of the lack of identity of issues.

the Supreme Court of Minnesota stated the matter thusly:

> We can find no justification for requiring a defendant to bear these burdens when, as here, he has been tried and acquitted of the other charge. It is true, of course, that an acquittal does not signify 'innocent'; it means instead 'not found guilty beyond a reasonable doubt' . . . even so, it is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interest of fairness and finality made no more to answer for his alleged crime. It is our view that the admission into trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair. Therefore, we conclude that under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense.

Exclusion of evidence of acquitted conduct on due process grounds fosters several purposes of the criminal justice system and is consistent with prior decisions of this Court.

First, the evidentiary use of acquitted conduct raises serious questions as to the reliability of such evidence. In *Loper* v. *Beto*, 405 U.S. 473 (1972) it was held a violation of due process to utilize a counselless conviction for purposes of impeachment. The absence of counsel went to "the very integrity of the fact-finding process", and accordingly such conviction was too unreliable. Similarly, because of reliability concerns this Court has held that counselless convictions may not be used at sentencing, *United States* v. *Tucker*, 404 U.S. 589 (1972) or to enhance a sentence under a recidivist statute. *Burgett* v. *Texas*,

389 U.S. 109 (1967). Indeed, as Chief Judge Kaufman noted in *United States* v. *Mespoulede*, 597 F.2d 329, 335, n. 9, in light of the principles of *Loper*, "it would be quite anomalous to permit the Government to argue guilt by proving to the jury that the defendant committed a crime of which he had already been acquitted." The defendant in *Loper* was at least convicted, in contrast to the situation here.[20] See also *Doyle* v. *Ohio*, 426 U.S. 610 (1976), where it was held that due process prohibits the cross examination of an arrestee concerning the exercise of his *Miranda* rights, in part because the reliability of drawing an inference from invocation of those rights is "insolubly ambiguous." *Id.* at 617. The drawing of an inference from evidence of other crimes for which the defendant has been acquitted is at least as "insolubly ambiguous" as is an inference from the exercise of one's *Miranda* rights.

Second, the defendant is forced for a second time to defend the allegation concerning conduct for which he has been acquitted. This creates a constitutionally unacceptable risk that the defendant will be erroneously convicted on the basis of this alleged conduct. While the defendant will not be convicted of the specific offense for which he

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[20] It might be argued that in the acquitted conduct case the Government is introducing evidence of the conduct itself and not utilizing a conviction. It is suggested that this argument is unpersuasive in light of the rationale behind the counselless conviction cases. For instance in *Tucker* it was noted that speculation as to whether the result would have been different had the defendant had counsel was "fruitless," the implication being that a lack of prejudice argument was not available to the state if for no other reason because there was no way to determine whether the defendant would still have been convicted if he had been provided counsel. 404 U.S. at 447. Here, there is no need for speculation—the defendant was acquitted of robbing Ms. Henry. The best that counsel could have done in any of the counselless conviction cases would have been an acquittal.

was acquitted he suffers the likelihood of being convicted for a separate offense based in part on inferences to be drawn from the acquitted conduct. The defendant's risk is just as great and his need to defend just as necessary. Indeed, double jeopardy jurisprudence recognizes the common-sense notion that the more times a defendant is tried the more likely it is that he will be convicted. See generally *Green* v. *United States*, 355 U.S. 184, 187 (1957). These same concerns are also protected by the due process clause. In *In Re Winship*, 397 U.S. 358 (1970) this Court held that due process requires that each element of a crime be proven by the Government beyond a reasonable doubt as this standard "is the prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. *Winship* stressed not only the "immense" and "transcending" interest of the defendant in a criminal case, but also society's interest in the reliability of jury verdicts. *Id.* Similarly, in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) this Court held that a Maine rule that shifted the burden to a defendant to prove the "heat of passion" necessary to reduce a murder to manslaughter violated due process in part because the rule tended to "increase further the likelihood of an erroneous murder conviction." *Id.* at 701.

Third, exclusion of acquitted conduct evidence furthers the desirable goal of consistency in jury verdicts. While it might be said that a conviction on the new offense is not inconsistent with an acquittal on an unrelated offense merely because evidence of the acquitted conduct was introduced in the second trial such a clinical approach ignores the fact that the conviction on the new offense may well be based in part on inferences drawn by the second jury that are inconsistent with the verdict of the first jury. While inconsistent verdicts in a *single* trial are tolerated since they could be due to mistake or lenity, *United States* v. *Powell*, 469 U.S. 57 (1984), inconsistency

is not a goal of the criminal justice system and "it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results." *United States* v. *Mespoulede*, 597 F.2d at 337.[21]

Fourth, such a rule has the advantage of easy application. Reliance on collateral estoppel principles requires the Court to engage in the often speculative process of attempting to determine the basis of the prior acquittal. Although *Ashe* counselled that the invocation of collateral estoppel should not be hindered by postulating "hypertechnical and unrealistic" grounds that might support the acquittal, *Ashe* at 444, nonetheless reconstruction of the basis of the acquittal is often speculative at best "for no one who is not present during the jury's deliberations can ever know precisely how the jury reached its verdict." *United States* v. *Mespoulede*, 597 F.2d 329, fn. 7 (2nd Cir. 1979).[22] An examination of the cases shows the often

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[21] In *Powell* Chief Justice Rehnquist explained that the rationale behind accepting inconsistent verdicts returned by a single jury in a criminal case is grounded in the recognition of the jury's unfettered discretion to return a verdict on ground of lenity or simply as a result of a mistake, and thus "it is unclear whose ox has been gored." *Id.* at 477. This consideration is not present here as there is no inconsistency in the first jury's return of an acquittal. The only inconsistency would be allowing a different jury to reach a different conclusion as to the defendant's guilt on the acquitted offense and utilize inferences therefrom to find the defendant guilty of the second offense.

[22] It is generally recognized that this difficulty may often unfairly operate to practically deprive a defendant of the benefits conferred by double-jeopardy and collateral estoppel. See generally Note: *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L. J. 962, 973 (1980); Note, *Ashe* v. *Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Columbia L. Rev. 321, 329 (1971); Mayers and Yarbrough, *Bis Vexari: New Trials*

difficult process of determining the basis of the prior acquittal. For instance, see *United States* v. *Salamone*, 869 F.2d 221 (3d Cir. 1989). Exclusion of such evidence on due process grounds, without an attempt to reconstruct the basis of the acquittal, is consistent with fundamental notions of fair play and at the same time avoids the pitfalls associated with the often convoluted task attempted by the courts in this area.

Finally, and perhaps most importantly, as the language cited above indicates, exclusion of evidence of acquitted conduct comports with fundamental notions of fairness. The concept that a defendant may not be convicted of an offense for which he has already been acquitted or of a new offense where evidence of the acquitted offense is relied upon is as important a component of due process as is the requirement of proof beyond a reasonable doubt or the prohibition against unconstitutional burden-shifting. A contrary rule undermines the significance of an acquittal in a criminal case.[23] The accused, although acquitted, is still subjected to the possible embarrassment and expense of an additional trial. The accused, although acquitted, is required to "suffer anew", *Burgett* v. *Texas*, 389 U.S. at 115, when forced to redefend the allegation. The accused, although acquitted, must still "live in a

and Successive Prosecutions, 74 Harvard L. Rev. 1, 35 (1960). This problem was illustrated in *Hoag*, though the overly restrictive approach of the state court, whose determination this Court accepted there, seems to have been repudiated in *Ashe*.

[23] In *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) this Court struck down as unconstitutionally vague a state statute authorizing the jury to assess costs even where an acquittal had been returned. At least two Justices thought the statute violated due process because it attempted to impose a penalty on a defendant who had been found not guilty.

continuing state of anxiety and insecurity," *Green* v. *United States*, 355 U.S. at 187, and can never be assured that "the matter is done" *State* v. *Wakefield*, 278 N.W. 2d at 309.[24]

As discussed in the Summary of Argument, *supra*, *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), is not necessarily inconsistent with the due process result urged by petitioner, as this precise issue was not before the Court in *Hoag*. A due process issue was presented in *Hoag* concerning whether principles of collateral estoppel inhere in due process. Petitioner's due process argument does not depend on collateral estoppel analysis. Further, to the extent that *Hoag* is viewed as inconsistent with the position urged by petitioner, it is respectfully suggested that the case should be overruled, as *Ashe*, if not directly calling into question the decision in *Hoag*, certainly emasculated its reasoning. Petitioner's position is simply that due process prohibits the relitigation of such evidence without the need to attempt the often convoluted collateral estoppel analysis. See Fn. 18. Petitioner would admit that the due process bar might admit of an exception where the defendant had made an explicit admission in the prior trial of the fact concerning which the Government seeks to introduce the prior acquitted evidence. In such situations the evidence would be admissible not as

[24] Petitioner utilizes this language in the sense of any further criminal liability being foreclosed after the acquittal. Petitioner does not contend that the acquittal should bar civil proceedings such as the forfeiture actions approved in *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984). Obviously, the defendant's interests in such proceedings are not as paramount and many of the concerns expressed above are not as applicable when the defendant is not facing criminal consequences for conduct of which he has already been acquitted. See Section II, *infra*.

other crimes evidence or conduct for which the defendant had been acquitted, but as an admission pursuant to Federal Rule of Evidence 801(d)(2).

II. THE ADMISSION OF THE VENA HENRY EVIDENCE TO SHOW IDENTITY PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B) WAS PRECLUDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WHERE THE DEFENDANT HAD PREVIOUSLY BEEN ACQUITTED OF ROBBING MS. HENRY.

A. The Development In This Court Of The Concepts Of Double Jeopardy And Collateral Estoppel In Criminal Cases.

The double jeopardy clause of the Fifth Amendment is a very simple statement of a general principle. The language "nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb" defines a social policy that is:

> Designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . .

Green v. *United States*, 355 U.S. 184, 187-8 (1957).

However, this language does little to answer such questions as what constitutes jeopardy, when jeopardy attaches, how a mistrial should be treated, what are the limits on government appeals, what constitutes the "same offense", what is the significance of overlapping jurisdictional boundaries etc. Thus, the contours of the double jeopardy clause remain "without a definite content until the courts or the legislatures supply definite policies." J. Sigler, DOUBLE JEOPARDY 36 (1969).[25]

[25] For a history of the origins and development of the double jeopardy concept, see Sigler, pp. 1-37. After tracing the historical evolution of double jeopardy from its Greek and Roman origins through canon law and later its common law development, the author concludes that "the historical development of double jeopardy is so complex that its genesis provides no sure indication of its meaning." Id. at 35.

Like many of the issues above, the "deceptively plain language"[26] of the double jeopardy clause gives no clear answer to the relationship of the common law doctrines of res judicata and collateral estoppel. While these later concepts were primarily developed in the civil area, the underlying rationales serve many of the same purposes of double jeopardy. The delineation of this relationship began in *Oppenheimer* v. *United States*, 242 U.S. 85 (1916), where the Court held res judicata applicable to criminal cases.[27] The original indictment had been dismissed on a statute of limitations defense. Subsequently, in a different case this Court held that the statute of limitations defense was not applicable. The Government then filed a new indictment charging the same offense. In rejecting the Government's argument that res judicata only exists in criminal cases in the "modified form of the Fifth Amendment" and that the defendant was never placed in jeopardy since a jury had not been selected, Justice Holmes wrote that "a defendant in a criminal case was surely entitled to as much protection as a debtor in a civil case." *Id.* at 87. While no reference was made to whether the result was mandated by the Fifth Amendment, the reasoning was termed "a fundamental principle of justice." *Id.*

[26] *Crist* v. *Betz*, 437 U.S. 28, 32 (1978).

[27] *Oppenheimer* is sometimes referred to as establishing the applicability of the concept of collateral estoppel in the federal criminal law. See *Ashe* v. *Swenson*, 397 U.S. at 443. Actually *Oppenheimer* appears to be a res judicata case.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948) it was held that, like res judicata, the doctrine of collateral estoppel also applies in criminal cases. Thus, where the defendant had been acquitted of conspiracy to defraud the United States by presenting false invoices, application of collateral estoppel principles precluded a second prosecution for the substantive offense of uttering the false invoices where a "practical" review of the evidence at the first trial suggested that the acquittal implied a lack of guilt on the substantive count as well. Again, there was no indication as to whether this result was required by the Constitution.

The answer to the latter question was supplied in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), when it was held that the concept of collateral estoppel in criminal cases was included within the ambit of the double jeopardy clause. "Not hesitat[ing]" to hold this "established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy", 397 U.S. at 445, the Court noted that at a minimum double jeopardy means that an acquitted defendant need not "run the gantlet" a second time. *Id.* at 446, quoting *Green* v. *United States*, 355 U.S. 184, 190.

B. The Principles Of Ashe Are Equally Applicable When The Government Seeks To Introduce Other Crimes Evidence Concerning Acquitted Conduct.

The factual paradigm presented in *Ashe* involved a reprosecution of the defendant for a second offense after he had previously been acquitted of another offense arising out of the same transaction. The issue presented in this case, which has divided the courts of appeal, and

which has not yet been addressed by this Court,[28] is whether the principles of *Ashe* apply when the Government seeks to introduce evidence of acquitted conduct at a subsequent trial involving an unrelated offense.[29]

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[28] This Court has considered the principles of *Ashe* and the significance of an acquittal to subsequent proceedings in several cases. Thus, collateral estoppel does not prohibit a defendant from being convicted of aiding and abetting even though the principal has been acquitted, *Standefer* v. *United States*, 447 U.S. 10 (1980); a plaintiff in a Section 1983 action based on alleged violation of the Fourth Amendment is collaterally estopped from relitigating the issue after it had been adversely decided against him in a state court criminal proceeding, *Allen* v. *McCurry*, 449 U.S. 90 (1980); and an acquittal does not collaterally estop the same issue from being litigated in a civil or forfeiture case, *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972); *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984). The issues presented in each of these cases are easily distinguishable from that presented here and where relevant, the holdings are discussed below.

[29] The cases and legal literature often utilize the term "ultimate" fact when referring to the introduction of acquittal evidence that is a necessary element or factual predicate for the second prosecution and the term "evidentiary" fact when the prior acquitted evidence is not the *sine qua non* of the second prosecution but merely offered pursuant to an evidentiary rule, such as Federal Rule of Evidence 404(b). *Ashe* utilizes the terminology "issues of ultimate fact," 397 U.S. at 443, because that was the situation before the Court in that if Ashe's identity had been determined adversely to the state's contention in the first trial there could be no further prosecution. The question presented here is the "evidentiary" situation, since petitioner could still be prosecuted for the bank robbery regardless of whether the prior jury had determined that he had not been the person who had robbed Vena Henry. Petitioner's references to "evidence of acquitted conduct" herein refers to the latter evidentiary situations. See *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980); Comment *Expanding Double Jeopardy: Collateral Estoppel and Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 Fla. St. L. Rev. 511, 19-20 (1974).

The vast majority of the circuit decisions considering this issue have recognized that some form of collateral estoppel is applicable to bar the introduction of evidence concerning unrelated crimes for which the defendant has been previously acquitted. However, the courts rejecting such evidence through application of collateral estoppel principles have not been in agreement concerning whether the result is required by the constitutional doctrine of *Ashe* or merely mandated by application of common law collateral estoppel principles. An analysis of the cases seems to reveal that most of the circuit courts of appeal considering this issue have held, as petitioner contends, that there is no doctrinal distinction between the use of such evidence in the *Ashe* scenario and the use of such evidence in a subsequent trial for unrelated criminal conduct.

Thus, decisions from the First, Second, Fifth, Eleventh, and District of Columbia Circuits have clearly held that double jeopardy principles of *Ashe* require the exclusion of acquitted conduct evidence in a subsequent prosecution unrelated to the factual scenario involved in the acquittal. *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir.), *cert. denied*, sub nom. *Latorie* v. *United States*, 108 S.Ct. 510 (1987); *United States* v. *Mespoulede*, 597 F.2d 329 (2nd Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972); *Albert* v. *Montgomery*, 732 F.2d 865 (11th Cir. 1984); *United States* v. *Day*, 591 F.2d 861 (D.C. Cir. 1978).

The Third and Sixth Circuits seem to base their decision on common law collateral estoppel doctrine without reaching the constitutional issues. *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980);[30] *United States* v. *Johnson*,

[30] In *Keller* the Third Circuit specifically reserved the question as

697 F.2d 735 (6th Cir. 1983). These courts often apply collateral estoppel without discussion of the distinction between the constitutional and common law doctrine.

Post-*Ashe* decisions from the Ninth and Tenth Circuits allow such prior acquittal evidence where it otherwise meets the standards of Federal Rules of Evidence 404(b). *United States* v. *Rocha*, 553 F.2d 615 (9th Cir. 1977); *United States* v. *Van Cleave*, 599 F.2d 954 (10th Cir. 1979). The Eighth Circuit seems to hold that *Ashe* does not prohibit the subsequent evidentiary use of acquitted conduct. *United States* v. *Riley*, 684 F.2d 542 (1982), *cert. denied* 459 U.S. 1111 (1983).[31] The approach to this issue may even vary among different panels of the same circuit. For instance in *United States* v. *Gentile*, 816 F.2d 1157 (1987) the Seventh Circuit seems to be holding that the *Ashe* principles would not be applicable in the evidentiary use situations, while in *United States* v. *Castro*, 629 F.2d 456 (1980) the court without directly so holding seems to

to whether the constitutional principles of *Ashe* apply to the attempted evidentiary use of acquitted conduct in situations not involving reprosecution for the same transaction. *Id.* at 1159-1160. In the instant case the Third Circuit assumed that the statutory harmless error standard, rather than that required by *Chapman* v. *California*, *infra*, applied without resolving the question it had explicitly left open in *Keller*. The petitioner's petition for rehearing before the Third Circuit, seeking reconsideration in light of the unresolved question in *Keller*, was denied without opinion. (App. 50).

[31] While this seems to be the holding in *Riley*, in *King* v. *Brewer*, 577 F.2d 435 (1978) the Eighth Circuit, also, in a strained, *Ashe*-prohibited, "hypertechnical" analysis, seems to say that the issue that the defendant sought to bar there was not actually decided in the first trial, thus making collateral estoppel inapplicable. *Id.* at 440-1. In coming to its conclusion the court apparently confused the *Ashe*-analysis barring prosecution altogether with the mere evidentiary bar scenario.

assume the applicability of *Ashe* to the evidentiary use of acquitted conduct.[32]

While the overwhelming majority of cases hold collateral estoppel applicable to the evidentiary use of acquitted conduct, the distinction as to whether such evidence is barred by the double jeopardy-collateral estoppel principles announced in *Ashe* or the mere application of common-law doctrinal collateral estoppel principles may be important in two distinct areas. First, as presented in this case, a stricter harmless error inquiry will be necessitated if such evidence is in violation of the Fifth Amendment. See *United States* v. *Gonzalez-Sanchez*, *supra*. Secondly, if such errors are of constitutional magnitude, then a claim of the erroneous admission of acquittal conduct evidence raises an issue cognizable in federal habeas corpus proceedings. See *Albert* v. *Montgomery*, *supra*; *Wingate* v. *Wainwright*, *supra*.

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[32] An analysis of the approach taken in the circuits requires a close examination of the factual paradigm presented in each case. For the most part the cases cited involve issues relating to the evidentiary use of acquitted conduct in unrelated subsequent prosecutions. Some cases involve a middle ground between the *Ashe* situation where the subsequent prosecution is based on the same transaction and the unrelated subsequent prosecution case presented here. These cases usually involve situations where the defendant is charged with both compound and predicate offenses, such as conspiracy and substantive offenses occurring during the conspiracy and where a retrial is necessitated after the acquittal of one or the other. For instance see *United States* v. *Jackson*, 778 F.2d 933 (2nd Cir. 1985), *cert. denied*, 479 U.S. 910 (1986). While it is not necessary to decide the applicability of these principles in the compound-predicate offense cases, as the issue is not presently before the Court, the defendant would suggest that the same principle would apply. In fact, *Sealfon* v. *United States*, 332 U.S. 575 (1948), discussed above, dealt with the application of collateral estoppel in such circumstances.

Petitioner submits that the cases holding that the evidentiary use of acquitted conduct evidence may constitute a violation of the double jeopardy-collateral estoppel principles of the Fifth Amendment correctly reason that the rationale of *Ashe* applies with equal force in these situations.[33] In *Green* v. *United States*, 355 U.S. 184, 187 (1957), this Court held that one of the principal purposes of double jeopardy protection:

> . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See also *Arizona* v. *Washington*, 434 U.S. 497, 503-4 (1978). *Ashe* recognized similar concerns in the concluding paragraph when it is noted that double jeopardy does not allow the state to utilize an initial trial as a "dry run for a subsequent one."

Collateral estoppel doctrine, on the other hand, "has the dual purpose of protecting litigants from the burden of

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[33] Commentators have similarly agreed that there is no principled distinction supporting the argument that *Ashe* should not be extended to the evidentiary use of prior acquitted conduct in subsequent unrelated prosecutions. See Comment, *Other Crimes Evidence: Relevance Reexamined*, 16 J. Mar. L. Rev. 371, 388 (1983); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L. J. 962, 976 (1980); Delao, *The Admissibility of Prior Acquitted Crimes Under Rule 404(b): Why The Majority Rule Should be the Majority Rule*, 16 Fla. St. U. L. Rev. (1989); Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 (1980); but see Note, *Evidentiary use of Prior Acquitted Crimes: The Relative Burdens of Proof Rationale*, 64 Wash. L. Qrt. 981 (1986).

relitigating an identical issue with the same party or its privy and promoting judicial economy by preventing needless litigation." *Parklane Hosiery Company* v. *Shore*, 439 U.S. 322, 326 (1979). In addition, "by preventing inconsistent decisions, [collateral estoppel] encourage[s] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).

These principles are all applicable to the evidentiary use of acquitted conduct in a subsequent trial. The overwhelming advantage that the Government has in resources make it inequitable to require a defendant again to mount a defense to a charge for which he has been acquitted.[34] It is no answer that the defendant is not being tried for the acquitted offense but for an unrelated one. It will often be as important for the defendant to successfully defend against the inference sought to be drawn by the evidentiary use of the acquitted conduct as it was in the original trial. However, the defendant may lack the resources and ability to again defend.[35] A defendant thus acquitted would also still be subject to "embarrassment, expense and ordeal, and compell[ed] to live in a

[34] ". . . double jeopardy is not simply res judicata dressed in prison garb. It was called before more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants." Note, *Twice in Jeopardy*, 75 Yale L. J. 262, 277-8 (1965). In addition to the relatively unequal resources argument, other collateral estoppel concerns, such as the potential for harassment of litigants are magnified in the criminal area. Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harvard L. Rev. 1, 32 (1960).

[35] In fact, since there is no requirement that the Government reveal the general details of its case in pretrial discovery in the federal system a defendant may not even be aware that the government intends to introduce acquitted conduct evidence at a subsequent trial, thereby impeding his defense. See *United States* v. *Kendall*, 766 F.2d 1426 (10th Cir.) *cert. denied*, 474 U.S. 1081 (1986).

continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. at 187. Since statute of limitations principles presumably would not apply to the evidentiary use of prior acquitted conduct, theoretically a defendant would always face the prospect of having once again to defend at some unascertainable time in the future against an allegation of which he has been acquitted.[36]

Other specific benefits conferred by collateral estoppel are evident. Exclusion of prior acquittal evidence promotes judicial economy in that it prevents the relitigation of issues that have been previously decided. The dramatic increase in the judicial workload coupled with ever-increasing belt-tightening measures by legislatures support the logical extension of the principles of *Ashe* to the evidentiary use of acquitted conduct. Large expenditures of resources to retry issues will be avoided.

The cases holding the principles of *Ashe* applicable to the evidentiary use of acquitted conduct recognize that the burden placed upon the defendant is indistinguishable from that faced by Ashe. Perhaps the idea was best stated by the Fifth Circuit in *Wingate* v. *Wainwright*, 464 F.2d 209, 213 (1972):

> We do not perceive any meaningful difference in the quality of 'jeopardy'[37] to which a defendant is again

[36] For instance, see *State* v. *Wakefield*, 278 N.W.2d 307 (Minn. 1979) where in a prosecution for a sexual offense allegedly occurring in June of 1977, the state attempted to introduce evidence concerning a rape for which the defendant had been acquitted six years earlier.

[37] Though the language of the double jeopardy clause does not define what is meant by "jeopardy," the concept is an evolving one. See Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harvard L. Rev. 1, 7-8. This Court has recognized that jeopardy may attach even where the first trial is not completed.

> subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of the 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges of factual allegations which he overcame in the earlier trial.[38]

Concisely stated, regardless whether the acquitted conduct evidence relates to a so-called "ultimate" fact or is merely "evidentiary," the simple fact remains that the defendant is being retried for the same conduct.[39]

Arizona v. *Washington*, 434 U.S. 497 (1978). Clearly, where, as here, the first trial was completed to verdict, the petitioner was placed in jeopardy more so than the defendant whose trial is aborted before the final verdict. It might be argued that the petitioner was not placed in jeopardy for the *Henry* offense in the instant trial, but as the cited part of the *Wingate* opinion indicates, clearly there was no difference in the quality of jeopardy as petitioner was in danger "of life or limb" within the meaning of the Fifth Amendment. The "life or limb" language of the Fifth Amendment also distinguishes the civil-forfeiture cases relied upon by the Government in its burden of proof argument, as there double jeopardy does not apply because the defendant is in no such danger.

[38] *People* v. *Acevedo*, 508 N.E.2d 665, 671 (N.Y. 1987). Similarly: "We perceive no meaningful difference in the unfairness to which a defendant is subjected when the state attempts to prove his guilt by relitigating a settled fact issue, once necessarily decided in its favor, whether it is a question of ultimate factor or evidentiary fact."

[39] The Restatement (Second) of Judgments, Section 27, Comment J. (1982) also rejects any purported distinction in the application of collateral estoppel principles based on a characterization of "ultimate" vs. "evidentiary" facts.

Finally, in addition to the applicable double jeopardy and collateral estoppel rationales, the petitioner would suggest that another well-recognized judicial doctrine counsels that prior acquitted other crimes evidence should not be admitted. While Federal Rule of Evidence 404(b) may have been intended to expand the admissibility of other crimes evidence, *Huddleston* v. *United States*, ___ U.S. ___, 108 S.Ct. 1496, 1499 (1988), the rule itself still reflects the long established common law principle that such evidence is not favored. See *Michelson* v. *United States*, 335 U.S. 469, 475-76 (1948). Petitioner suggests that the barriers to admission of this type of evidence should not be further removed by allowing the use of evidence of acquitted conduct. The dangers that such evidence may be wrongfully utilized by a jury to infer guilt from an alleged propensity towards criminal conduct may actually be greater when such acquittal conduct evidence is admitted. The defendant, as here, may well want to bring to the jury's attention the fact that he was acquitted.[40] In such circumstances the jury may well draw the inference that the defendant has "gotten a break" once and that it is unlikely that he would be wrongfully charged the second time. This type of reasoning, coupled with the dangerous tendency to infer propensity, may well cause the jury to give even more weight to the acquitted conduct evidence.

In this vein petitioner notes that this Court has tended to expand the protection afforded by collateral estoppel,

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[40] As with the decision whether to admit such evidence in the first instance, those jurisdictions allowing the admission of acquitted conduct are not in agreement as to whether the defendant is entitled to show that he was acquitted. See Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 934.

when consistent with the underlying philosophy of that doctrine and where necessary to accommodate the changing realities of litigation. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Company* v. *Shore*, 439 U.S. 322 (1979); *Montana* v. *United States*, 440 U.S. 147 (1979). The result in *Ashe* was to some extent dictated by modern changes in the criminal charging process "with the advent of specificity and draftmanship and extraordinary proliferation of overlapping and related statutory offenses" making a single alleged criminal transaction the possible subject of numerous prosecutions. 397 U.S. at 445, n. 10. Similarly, an expansion of *Ashe* to bar the evidentiary use of prior acquitted conduct would be responsive to doctrinal changes in the criminal law which have the potential to unfairly prejudice the defendant. This Court has noted that Rule 404(b) was intended to expand the grounds of admissibility of other crimes evidence. *Huddleston* v. *United States*, 108 S.Ct. at 1501.[41] With the expanded concept of the admissibility of other crimes evidence and the long recognized dangers inherent in such evidence, see IA Wigmore, *Evidence*, Section 58.2 (Tillers rev. 1983), application of the principles of *Ashe* to bar such evidence when there previously has been an acquittal is a needed response to the development in this area of the law and one which is consistent not only with the policies of collateral estoppel and double jeopardy, as discussed above, but also with the desirable goal of attempting to minimize the possibility that a jury will

[41] See also 2 Weinstein and Berger, *Evidence*, Section 404[08], p. 404-54. While Rule 404(b) adopts the so-called "inclusionary" rule, most jurisdictions follow the "exclusionary rule," which presumes that such other crimes evidence is not to be admitted, though in practice the results are often similar.

decide a defendant's guilt on the basis of extraneous and prejudicial other crimes evidence.

The Government's main argument against the applicability of *Ashe* to the evidentiary use of prior acquittal evidence seems to be a burden-of-proof analysis. Thus, the Government argues that inasmuch as an acquittal only establishes a reasonable doubt of the defendant's guilt and since under *Huddleston* v. *United States*, *supra*, proof beyond a reasonable doubt of conditional facts establishing relevance is not required, the acquittal should not operate as a bar to admissibility. Response of Government to Petition for Writ of Certiorari, p. 8-10. In support of this argument the Government cites this Court's opinions in *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1975), and *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354, 359-62 (1984). In each of these cases the Court held that defendant's acquittal did not bar a subsequent related forfeiture or civil penalty action based on the same conduct.

The Government's reliance on this line of cases is inapposite for several reasons. First, there is a clear difference in the attempted use of acquitted conduct evidence in a subsequent forfeiture or other civil action and the reliance on such evidence in a criminal case. This Court has often recognized the overarching interest of a defendant in a criminal case. See *In re Winship*, 397 U.S. 358, 363-4 (1970). Further, as noted in *One Lot Emerald*, the provisions of double jeopardy are inapplicable because the forfeiture "involves neither two criminal trials nor two criminal punishments." 409 U.S. at 234; *Eighty-Nine Firearms*, 465 U.S. at 364. See footnote 37, *supra*. Clearly, the use of acquitted conduct evidence in the subsequent criminal prosecution cases is distinguishable

from its use in the civil penalty and forfeiture cases relied upon by the Government. That such a "hypertechnical" approach counters the policies behind *Ashe* is evidenced by the numerous courts of appeals cases cited above holding this type of evidence inadmissible.[42]

> As stated in *United States* v. *Mespoulede:*
>
> This is not a situation in which the second suit is civil in nature, where the defendant faces sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges.
>
> 597 F.2d at 335.

In addition, *Ashe* itself seems to reject the attempted jettisoning of collateral estoppel principles by invocation of a burden of proof argument:

> As a rule of federal law, therefore, "it is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the government had not met the higher burden of proof exacted in such cases for the government's evidence as a whole although not necessarily as to every link in the chain." *United States* v. *Kramer,* (cite omitted).

397 U.S. at 443

Finally, the Government's interpretation would unfairly deprive many defendants of the benefits sought to be protected by double jeopardy and collateral estoppel. The fact that an acquittal may be returned if there is a

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[42] This argument applies equally to the cases excluding such evidence on constitutional grounds and those relying on non-constitutional collateral estoppel. The evidence would not be precluded by either doctrine if the government's burden of proof argument was accepted.

reasonable doubt does not signify that all such verdicts reflect the jury's belief that the charges simply were not "proven." It is not unreasonable to interpret an acquittal as reflecting a finding of innocence by the jury. Comment, *Other Crimes Evidence: Relevance Reexamined,* 16 J. Mar. L. Rev. 371, 388 (1983). Certainly it can't be argued that all defendants are actually guilty and that acquittals only reflect a lack of proof. Clearly there is a large class of acquitted defendants who are indeed innocent and are believed so by the jury. These defendants will be unfairly penalized by such a "hypertechnical" approach as they may be required to later again defend against the same allegations despite their innocence and thus unfairly run the increased risk that they may be convicted in part because of erroneous inferences drawn from conduct of which they are innocent and have been so declared.

C. Applications Of These Principles To Facts Of This Case.

As discussed in petitioner's due process argument above, the attempt to reconstruct the basis of the jury's acquittal can be a difficult process. Collateral estoppel simply means that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit of a different cause of action involving a party to the first case." *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980). *Ashe,* recognizing an overly technical approach to the analysis would have the effect of eviscerating the doctrine of collateral estoppel, observed:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters and conclude whether a rational jury could have

> grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' Mayers and Yarbrough, *Bis Vexari: New Trial and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39.

Reconstruction of the basis of the *Henry* acquittal is difficult in light of the fact that the transcript, pleadings, and instructions in the *Henry* case were not filed in the instant case. After defense counsel argued that the *Henry* evidence should be excluded because of the acquittal, "on that basis alone," the trial judge, in a conclusory and an unexplained manner, commented that he did not "believe" that petitioner had been acquitted on the issue of identification." (App. 21). The prosecutor then responded that the co-defendant in the *Henry* case, Mr. Christian, had defended on the basis that he had "merely came to retrieve from an individual in the house money from an the individual in the house." [sic]. (App. 21).[43] The court then remarked:

> Mr. Dowling's presence in the house was not seriously contested in the case but he stated the *general defense*. Mr. Dowling, I don't think, took the stand." (App. 21). [Emphasis added].

In its response to the petition for writ of certiorari the Government contended that the Third Circuit erroneously placed the burden of proof on the Government to show that the issue upon which it sought admission of the *Henry* evidence was not expressly decided by the acquittal. Government's Response to Petition for Writ of Certiorari, p. 5, n. 1. Without expressly so holding, it

[43] The prosecutor admitted that he was not present at the trial of the *Henry* robbery. (App. 21).

does appear that the Third Circuit viewed the burden to be on the Government on this issue. (App. 43-44).

Petitioner submits that the burden indeed should be placed on the Government to show that the issue upon which it seeks to admit prior acquittal evidence under Rule 404(b) was not necessarily determined in the prior trial. This result follows from accepted burden of proof rules concerning the admission of other crimes evidence as well as this Court's decision in *Huddleston* v. *United States*, 108 S.Ct. 1496 (1988). The proponent of Rule 404(b) evidence has the burden of establishing such evidence is relevant to the issues under consideration. *United States* v. *Biswell*, 700 F.2d 1310, 1317 (10th Cir. 1983); *United States* v. *Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). While holding that a court need not make a preliminary finding under Federal Rule of Evidence 104(a) that the Government has proved the other crime by a preponderance of the evidence, *Huddleston* did recognize that "evidence is admissible under Rule 404(b) only if it is relevant," *Id.* at 1501, and that the proponent does bear the burden under Rule 104(b) of establishing the conditional relevance by a preponderance of the evidence. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter *properly probable* in the case." Advisory Committee Notes on Federal Rule of Evidence 401, 28 U.S. App., p. 688. [Emphasis added]. Where the issue upon which the Government seeks to admit Rule 404(b) evidence has been previously decided, and its admission would violate the defendant's protection against double jeopardy, then the matter is not relevant in the sense of being "properly provable." It therefore logically follows that when attempting to present prior acquittal evidence under Rule 404(b), the Government, as

the proponent of the evidence, should bear the burden of establishing relevance and that the matter is "properly provable" in the sense that the acquittal does not operate as a collateral estoppel bar. Thus, *Huddleston*, when applied to the acquitted conduct situation, is consistent with the general rule that the proponent of such evidence bears the burden of establishing admissibility.

Another argument supports placing the burden of proof on the Government on this issue. Even if the Government's argument is correct that defendant should have the burden of showing that the issue upon which he seeks to foreclose evidence was necessarily decided in his favor in cases arising under the *Ashe* factual scenario, i.e. the "ultimate facts" case, such a result does not follow in this case. In *Ashe* situations the defendant is seeking to completely bar the second prosecution. Traditionally, a defendant who seeks to dismiss an indictment or otherwise foreclose a prosecution has the burden of proving the grounds upon which he seeks such relief. *United States* v. *Liotard*, 817 F.2d 1074 (3d Cir. 1987) (double jeopardy); *United States* v. *L'Allier*, 838 F.2d 234 (7th Cir. 1988) (speedy trial); *United States* v. *Giorgi*, 840 F.2d 1022 (1st Cir. 1988) (prosecutorial misconduct). However, in the admission of prior acquittal evidence in a subsequent unrelated trial, the defendant does not seek the more drastic remedy of terminating the prosecution but merely seeks to exclude the acquitted conduct evidence.

Here, the Third Circuit correctly held that the Government had not carried its burden on this issue. The fact that a co-defendant in the *Henry* case perhaps put forth a different defense[44] does not mean that the jury had deter-

[44] In fact, there is nothing in that record to indicate the precise testimony of petitioner's co-defendant, Delroy Christian, in the

mined the issue of petitioner's identity adversely to his contentions.

There is nothing further in the record to support the Government's contention that the jury in the *Henry* case had not decided the defendant's identity adversely to the Government. While stating that identity was not "seriously contested," the district court further noted that the defendant had stated the "general defense" and had not testified. (App. 21). However in the instant case the defendant did testify and denied that he was at Vena Henry's house at the time of the alleged robbery. (Supp. App. 1-5). Had the defendant actually admitted in his defense at the *Henry* trial that he had been at the Henry's residence, then it would be expected that the Government would have impeached his specific denial when he testified at this trial.[45] Further, there was evidence adduced in this case that petitioner had denied his involvement in the *Henry* case when first arrested in connection with that matter and *that denial had been introduced in evidence at the Henry trial*. (Tr. 9-23&24:60-1).

Finally, the Government's purported explanation that the first jury may have decided that petitioner was not

Henry trial. The Assistant United States Attorney stated that Christian had put forth a defense that the Henry incident was not really a robbery but was only an attempt "to retrieve from an individual in the house money . . ." (App. 21). There is no indication that Delroy Christian introduced any evidence or contended that petitioner was with him at the time. Even if the petitioner's co-defendant had so contended it is not clear how or why this would bar petitioner.

[45] Even though the defendant had not testified in the *Henry* trial, if his attorney, through witnesses or in argument, had admitted the petitioner's presence at the Henry house, then petitioner could have been cross-examined concerning this in the instant trial. See Federal Rule of Evidence 801(d)(2)(D). *United States* v. *McKeon*, 738 F.2d 26, 30 (2nd Cir. 1984).

guilty of the Henry robbery because it was in fact not a robbery but merely an attempt to collect money by using a mask and a gun is at a minimum counter to a common-sense interpretation and violates *Ashe's* injunction that a court must look at such issues "with realism and rationality," 397 U.S. at 444. Not only contrary to common-sense, such a purported explanation in all likelihood would be inconsistent with the requirement that a court, in examining such issues, look to the instructions given to the acquitting jury. *Sealfon* v. *United States*, 332 U.S. at 579. While the instructions in the *Henry* case are not part of this record, it is suggested that the jury in all likelihood was not instructed that it would be a defense to robbery to claim that the alleged robber merely approached an individual with a mask and gun in an effort to "retrieve" money, after breaking into the person's house. Such a strained interpretation violates *Sealfon's* admonition that the "instructions under which the verdict was rendered, however, must be set in a practical frame . . ." 332 U.S. at 579.

Petitioner respectfully submits that the Government, as proponent of the acquitted conduct evidence under Rule 404(b), did not bear the burden of establishing that such matter was relevant and "properly provable" and that the government's purported, non-evidenced explanations of the basis of the *Henry* verdict constitute precisely the "hypertechnical analysis" condemned in *Ashe*.

III. THE ADMISSION OF THE VENA HENRY EVIDENCE WAS NOT HARMLESS.

If the Vena Henry evidence was wrongfully admitted under the due process or double jeopardy clauses of the Fifth Amendment, then, contrary to the harmless error analysis applied by the Third Circuit, petitioner is entitled to have the affect of that error reviewed under the

standards of *Chapman* v. *California*, 386 U.S. 18 (1967). Thus, the "beneficiary of a constitutional error," here the Government, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

There appears to be conflicting authority and views as to whether this Court should itself undertake a review of the record to determine the issue of harmless error. See *United States* v. *Lane*, 474 U.S. 438 (1986). While this Court certainly has the power to conduct the harmless error evaluation, it appears that it exercises this power "sparingly." *United States* v. *Hasting*, 461 U.S. 499, 510 (1983). Petitioner submits that a remand for a harmless error analysis under *Chapman* is more appropriate. In the event the Government in its brief attempts to reach the merits of whether the admission of the Vena Henry evidence actually constituted harmless error within the meaning of *Chapman*, petitioner will more specifically address this issue in a reply brief.[46]

---

[46] In the petition to rehear and suggestion for a rehearing en banc in the Third Circuit, petitioner contended that the court had not only utilized the wrong standard in evaluating the effect of the error, but in addition had improperly applied the standard it did utilize. The Third Circuit's analysis appeared to be more of a sufficiency-of-the-evidence inquiry, which is distinct from harmless error analysis. See *United States* v. *Lane*, *supra*; *Kotteakos* v. *United States*, 328 U.S. 750 (1946). *Kotteakos* requires an "examination of the proceedings in their entirety." 328 U.S. at 762. The Third Circuit cited the evidence supporting a verdict of guilty, but failed to give proper weight, and at times even mention, evidence indicating that each of the eyewitnesses had failed on one or more occasions to identify the defendant in pretrial identification procedures, the weak and indeed perhaps even collusive explanations for those failures, the limited time and stress under which the obeervations were made, etc. In addition, the Third Circuit cited circumstantial evidence tending to support the hypoth-

CONCLUSION

The petitioner submits that his Fifth Amendment rights to due process of law and protection against double jeopardy were violated by the admission of the testimony of Vena Henry. Accordingly, this case should be remanded to the United States Court of Appeals for the Third Circuit to determine whether the admission of such error was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).

Respectfully submitted,

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esis of guilt, but failed to adequately address how portions of this evidence, which could only logically be connected by the Henry testimony, must be discounted in light of the exclusion of the Henry evidence. See generally (App. 45-9).

APPENDIX

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EXCERPTS FROM TRIAL TESTIMONY OF PETITIONER REUBEN DOWLING 2a

Excerpts From Trial Testimony Of Petitioner Reuben Dowling

[11] him.

Q. Do you—what do you know about a woman by the name of Vena Henry. Have you heard of that name before?

A. Yes, I know Miss Vena Henry.

Q. How do you know her?

A. I had a case here, you know, and my attorney had testified yesterday, John Chamble, you know he told me that that woman, Vena Henry claim that she took a mask off me, you know. So, I told him, I say, hey, like, I asked the police if she have a mask that she took off me, ask the police if they have hair in the mask, and I told him I would volunteer to give my hair if they find hair in the mask, and police came and took me to a doctor, and the —

ATTORNEY MARSHACK: Objection.

THE COURT: Sustained.

Q. Mr. Dowling, did there ever come a time when you were in court involving an incident with Vena Henry?

A. Yes, I was in court [12] involving an incident, and the jury found me not guilty, I didn't even testify, you know.

Q. Was there any other time in 1979 when you were in court?

A. Yes, I was.

Q. What was that incident?

A. In 1979, I was 21 years old, and me and my brother and my friend was convicted for bank robbery, and Judge Christian give us 15 years.

ATTORNEY MARSHACK: Objection.

THE COURT: Sustained.

ATTORNEY MOSS: No further questions at this time, Your Honor.

THE COURT: Your witness. While counsel is coming forward, I want to bring to the jury's attention that Mr. Dowling has brought out the fact that in 1979 he was convicted of the felony of bank robbery. That is allowed to be brought out if Mr. Dowling chose to testify, it is allowed to be brought out.

Not to suggest that he was [13] involved in the matter at present, but rather it is allowed to be used. Felony conviction is allowed to be used for purposes of impeachment. You may keep that in your mind if you choose to, having to do with credibility and believability as I will talk about in the case.

CROSS EXAMINATION BY ATTORNEY MARSHACK:

Q. Good afternoon, Mr. Dowling?

A. Good afternoon, sir.

Q. Do you recall being in Ms. Vena Henry's House on July 20, 1985?

A. No, sir.

Q. Isn't it a fact that you — you discussed with us that you came into court and Ms. Henry came in and talked in the courtroom; isn't that correct, that you came on trial here in 1985 having to do with Ms. Henry, and you came to court, and she [14] testified against you, is that correct?

A. Correct.

Q. And you had a codefendant in that case?

A. Yes.

Q. What was that codefendant's name?

A. Delroy Christian.

Q. Now, isn't it true that Mr. Zurita arrested you in connection with that crime that you were charged with at 99 Strawberry?

A. Zurita always arrest me.

Q. And isn't it true that you made two statements to Detective Zurita with respect to that incident?

A. I never made no statement to Zurita, never.

Q. Isn't it a fact that you told Zurita with respect to the incident at 99 Strawberry to check the guy out, there wasn't no robbery?

A. I never tell Zurita that.

[15] Q. When you were arrested in connection with that incident at 99 Strawberry, didn't you tell Officer Zurita that the only thing he can convict you of is bank robbery and you were wearing a mask and gloves?

A. Zurita make up that.

ATTORNEY MARSHACK: May I have a moment? I have nothing further, Your Honor.

THE COURT: You have anything further Miss Moss?

ATTORNEY MOSS: Yes.

REDIRECT EXAMINATION: BY ATTORNEY MOSS:

Q. Mr. Dowling, when you were arrested by officer Zurita, on July 22, 1985, do you recall seeing an Advice of Rights form?

A. Yes, ma'am.

Q. Can you explain to the jury what that form said?

A. Well, Zurita did bring me a

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Supreme Court, U.S.
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QUESTIONS PRESENTED

1. Whether, in petitioner's trial for offenses arising out of a bank robbery, the trial court erred by admitting evidence of a separate robbery of which petitioner had been acquitted in a prior trial.

2. If the admission of that evidence was error, whether the error was harmless.

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OPINION BELOW

The opinion of the court of appeals (J.A. 30-49) is reported at 855 F.2d 114.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1988. A petition for rehearing was denied on September 28, 1988 (J.A. 50). The petition for a writ of certiorari was filed on November 28, 1988 (a Monday), and was granted on February 27, 1989 (J.A. 51). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides:

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law[.]

The "harmless error" statute, 28 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 404(b) of the Federal Rules of Evidence provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a); two counts of first-degree robbery, in violation of V.I. Code Ann. tit. 14, § 1862(2) (Supp. 1988); two counts of third-degree assault, in violation of V.I. Code Ann. tit. 14, § 297(2) (Supp. 1988); one count of grand larceny, in violation of V.I. Code Ann. tit. 14, § 1083(1) (1964); and one count of unauthorized use of a vehicle, in violation of V.I. Code Ann. tit. 14, § 1382 (Supp. 1988). He was sentenced to 70 years' imprisonment. J.A. 12-14.[1]

1. a. The evidence at trial showed that on the afternoon of July 8, 1985, a man armed with a pistol and wearing a mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix. Between 2:15 and 2:30 p.m., shortly before the bank closed, the robber entered the bank and jumped over the counter into the tellers' cages. After ordering "nobody move," the robber pointed his gun at the teller nearest him and told her to open her cash drawer. The teller quickly complied, and the robber took more than $2000 in cash and stuffed it into a brown paper bag. The robber proceeded to the next teller station, which was unoccupied, but he was unable to open the locked cash drawers. He then moved to the next station and, pointing his gun at the teller there, ordered her to open her cash drawers. She complied, and the robber took more than $5000 from her. 9/22 Tr. 92, 95, 100-104, 110, 117-118, 120, 123-124, 146, 151-152, 158-159, 187.

The robber wore a blue or black woven ski mask or herb hat with two holes cut out for the eyes. He also wore a green army fatigue shirt, blue jeans or dark pants, white

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[1] This case arises from petitioner's third trial on the present charges. At the first trial, the jury failed to reach a verdict. At the second trial, petitioner was convicted, but the court of appeals reversed on the ground that petitioner may have been prejudiced by the jury's exposure to newspaper accounts of the fact that petitioner had been charged with committing another robbery and a murder while on bail awaiting his bank robbery trial. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134, 141 (1987).

sneakers, and gloves. The pistol he carried was a "black and shiny" small caliber handgun. The robber was described as being tall, fit, and athletically built. See 9/22 Tr. 97-98, 110-111, 120, 124, 126, 147, 152, 159-160, 187-188.

The robber left the bank and ran to a parking lot across the street. After running around for a short time there, he began running up and down the street, apparently looking for something. 9/22 Tr. 108, 154-155, 190, 222-223. The robber then stepped in front of an approaching taxi van and stopped it. The robber went to the driver's side of the van, pointed his gun at the taxi driver, and pulled the driver out of the van. As the robber drove off with the windows rolled down, he started to pull off his mask. 9/22 Tr. 160-161, 165-167, 170-171, 173-174, 180, 182, 223-224.

Antonio Messer was in the bank when the robbery began, but he managed to slip out. While he hid behind a pillar in front of a building near the street, he saw the robber leave the bank, run around, and commandeer the taxi van. Messer then watched the robber drive toward him and pull up his mask. Messer was approximately 15 feet away when the robber drove past, and, because the robber had pulled up his mask by that time, Messer got a good look at the robber's face, both head on and from the side. 9/22 Tr. 188-195, 222-226, 236-238. At trial, Messer identified petitioner as the robber. 9/22 Tr. 198, 239.

After making his getaway, the robber drove the taxi van into the front yard of a house about a mile outside of Frederiksted. Hayde Pichardo, who was sewing in her bedroom near the window, heard the van and looked out the open window as the van drove into her front yard. She became upset because her young children were playing outside, and she shouted an obscenity at the driver. The driver stopped the van and stuck his head out the window to see who had shouted at him. Pichardo got a good look

at the driver's face from about 21 feet away. 9/22 Tr. 242, 246, 258-261, 270-271. At trial, Pichardo identified petitioner as the driver of the van. 9/22 Tr. 246.

Amada Rosario, Pichardo's 17-year-old daughter, was sitting near the window watching television when she heard the taxi van pull into the front yard. She looked out the open window of the dining room, and she heard her mother yell at the driver. She was on the same level as the taxi van, and she could see directly into the driver's side of the van, which was nearest to her. When the driver stuck his head out of the window, Rosario saw his face from about 24 feet away. 9/23 & 9/24 Tr. 4-5, 16-21. At trial, Rosario also identified petitioner as the driver of the van. 9/23 & 9/24 Tr. 16, 37.

b. The day before the robbery, petitioner borrowed a white Volkswagen from a friend, Philip Tutein. 9/23 & 9/24 Tr. 37-40, 63-65. On the morning of the robbery, a police officer saw Tutein's Volkswagen stalled in the middle of the road. One of the occupants of the car was a medium to heavy built dark male wearing a knitted herb hat and a green army fatigue shirt. 9/23 & 9/24 Tr. 44, 46, 49-50.

Between 2:15 and 2:20 p.m. on the day of the robbery, a police officer in Frederiksted saw a white Volkswagen parked near the bank with its front door open into the street. The occupants of the car were Delroy Christian and a second individual. The officer told the two men to close the door, and they drove away to the north. The officer and her partner followed the Volkswagen for about a mile before returning to town. Shortly thereafter, the officers received a radio report that the bank had been robbed. 9/23 & 9/24 Tr. 52-56.

2. Before opening statements, the government disclosed its intention to offer the testimony of Vena Henry pursuant to Fed. R. Evid. 404(b). The district court con-

ducted a hearing to determine whether that evidence should be admitted. J.A. 15-25.

According to the government's proffer, Henry would testify that petitioner and Delroy Christian had entered her house on July 21 or 22, 1987, approximately two weeks after the bank robbery; that petitioner was wearing a mask with only eye holes cut out and was carrying a small handgun; and that during a scuffle she pulled the mask off petitioner and was able to see his face. J.A. 15-16.

Henry's testimony was offered to corroborate eyewitness testimony that petitioner was the bank robber, J.A. 15-17. The prosecutor outlined the government's evidence that petitioner had borrowed a white Volkswagen shortly before the robbery, that a person matching the robber's description was seen in the same car on the morning of the robbery, that Christian had been in a white Volkswagen with its door open at the time of the robbery but had driven away after attracting the attention of the police, and that the robber had looked up and down the street outside the bank before commandeering the taxi van. Henry's testimony, the prosecutor suggested, would support the inference that petitioner was the robber and had planned to make his getaway in the white Volkswagen with Christian's assistance. See J.A. 17. The prosecutor also argued that similarities between the two robberies tended to identify petitioner as the bank robber. J.A. 16-17.

In connection with the incident at Henry's house, petitioner was charged under territorial law with burglary, attempted robbery, assault, and weapons offenses. He was tried for and acquitted of those offenses before his trial for the bank robbery began. J.A. 17, 21-22. However, the district judge, who had presided over petitioner's earlier trial for the Henry robbery, commented that petitioner "was not acquitted on the issue of identification." J.A. 21.

The court noted that petitioner's "presence in the house was not seriously contested in th[at] case" (J.A. 21).

Over petitioner's objection, the district court ruled that Henry's testimony was admissible. The court determined, by "clear and convincing evidence," that the evidence fell "within the ambit of" Rule 404(b) and that it was more probative than prejudicial. J.A. 25. Describing the proffered testimony as "classic circumstantial evidence," the district judge found that it was relevant "without any question." J.A. 24-25.[2] The court further found that it could avoid any prejudice arising from the introduction of the evidence "by pointing out to the jury that in that later instance [the trial involving the incident at Henry's house] Mr. Dowling was not convicted." J.A. 25.

Henry testified that two persons entered her house one morning in July 1985 and that "one of them was wearing a mask over their [*sic*] face" and carrying a "[b]lack silvery gun." J.A. 26-27. She also testified that she "raise[d] [the mask] half way and the person took it off and dump [*sic*] it on the table." J.A. 27. She identified petitioner as the person who was wearing the mask, and she testified that Delroy Christian was the man with petitioner that day. J.A. 28. No other details of the incident were elicited.[3]

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[2] The district court explained (J.A. 24):

> The discussion that we have just heard, while it deals with 404B also deals with a classic situation of circumstantial evidence insofar as it is sought to demonstrate through the Tutein vehicle being lent to Mr. Dowling, the presence of Mr. Delroy Christian in the Tutein vehicle and then earlier or later, rather, a relationship between Mr. Delroy Christian and Mr. Dowling. This is classic circumstantial evidence from which inferences are sought to be drawn.

[3] Petitioner's attorney did not cross-examine Henry. Petitioner took the stand and denied being involved with Christian in the incident at Henry's house. Pet. Br. App. 2a-4a.

When Henry left the stand, the district court instructed the jury about petitioner's acquittal of the robbery charges and the limited purpose for which Henry's testimony was being offered. J.A. 28. The court repeated that admonition in its final charge to the jury. J.A. 29. On the latter occasion, the court told the jury that it could consider Henry's testimony (*ibid.*):

> to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. [Petitioner] was found not guilty of the crime of robbery in connection with that.

3. The court of appeals concluded that Henry's testimony should have been excluded from evidence, but nevertheless affirmed petitioner's conviction. J.A. 40-49. Citing its decision in *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980), the court held that petitioner's acquittal of the charges arising from the robbery at Henry's home collaterally estopped the government from offering evidence of that incident in petitioner's bank robbery trial. J.A. 41-44.[4]

[4] The court rejected the government's contention that petitioner's acquittal on charges arising from the Henry robbery did not establish that he had not accompanied Christian to Henry's house, wearing a mask and carrying a gun. J.A. 42-43. Noting that no extrinsic evidence of the record of the prior trial had been submitted, the court of appeals found the trial court's observations that petitioner "was not acquitted on the issue of identification" and that his "presence in the house was not seriously contested" were "an insufficient basis on which to conclude that the issue of Dowling's participation in the robbery was not determined" (J.A. 43). "Even assuming that [petitioner's] identity and presence in Henry's house were not specifically disputed," the court continued, the government could not assert "that evidence concerning one element of an offense is separable for evidentiary purposes from a jury's general verdict of acquittal merely because it was not directly contradicted." J.A. 44.

The court of appeals reached the same conclusion under the rules of evidence. J.A. 44-45. Relying on *Huddleston* v. *United States*, 108 S. Ct. 1496 (1988), the court found that the robbery of Henry's home was not admissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor.' " J.A. 44 (quoting 108 S. Ct. at 1501). Even if *Huddleston* did not require the exclusion of the evidence, the court of appeals continued, the prior acquittal had to be taken "to signify that it was not proven that [petitioner] committed the 'bad' act charged" and thus "the marginal relevance of the evidence was more than amply outweighed by the potential prejudice" under Fed. R. Evid. 403. J.A. 45.

The court of appeals concluded, however, that the admission of Henry's testimony was harmless error. J.A. 45-49. The court stated (J.A. 45) that it "need not in this case be convinced that the error was harmless beyond a reasonable doubt," the harmless error standard that applies to constitutional errors, see *Chapman* v. *California*, 386 U.S. 18 (1967). That standard was not applicable, the court held, because in the court's view the error was merely evidentiary and not of constitutional dimension. Instead, the court applied the standard of review that is applicable to non-constitutional errors, under which an error is deemed harmless if it is "highly probable" that the error did not affect the verdict (J.A. 46). See *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). The court of appeals joined in the trial court's characterization of the evidence against petitioner as "overwhelming." J.A. 46. In addition, the court pointed out that the trial court had in-

structed the jury of the "limited value" of testimony regarding the incident at Henry's house and of petitioner's acquittal. J.A. 48. And, noting that evidence of a prior felony conviction was properly introduced to impeach petitioner at the bank robbery trial, the court found that "it is unlikely that the admission of the Henry testimony more than marginally affected the jury's overall character assessment of [petitioner]." J.A. 49. The court of appeals therefore concluded that "there is a 'high probability' that the error in admitting the Henry testimony did not prejudice [petitioner]." J.A. 49. Having rejected petitioner's other claims of error (J.A. 32-40), the court affirmed the conviction.

SUMMARY OF ARGUMENT

I. A. Petitioner's prior acquittal on charges arising from the incident at Henry's house did not bar the admission of Henry's testimony at the trial below. The prior acquittal represented only a determination that petitioner had not been proved guilty of the offenses charged beyond a reasonable doubt. In light of well-established collateral estoppel principles, that determination did not foreclose the lesser finding required for the introduction of Henry's testimony into evidence in this case. Under the Rules of Evidence, Henry's testimony was admissible if the jury could find, by a preponderance of the evidence, that petitioner accompanied Christian to her house while wearing a mask and carrying a gun. Since there was no inconsistency between that showing and petitioner's prior acquittal, collateral estoppel is inapplicable to this case.

The Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), does not require a different conclusion. In *Ashe*, the State was attempting in a second prosecution to establish beyond a reasonable doubt a fact that a prior jury had

decided under the same standard of proof—specifically, a defendant's participation in the same robbery of which he had already been acquitted. It would be a very substantial extension of *Ashe* to hold that collateral estoppel or double jeopardy principles limit the evidence that may be admitted to prove an offense that is entirely separate from the one of which the defendant has been acquitted.

The Double Jeopardy Clause and its underlying values do not support that extension of *Ashe*. The guarantee against double jeopardy—and the values it expresses—are implicated only when a defendant is placed twice in "jeopardy" for "the same offence." U.S. Const. Amend. V. Admitting evidence of an offense of which a defendant has been acquitted to prove his guilt of a separate offense cannot fairly be characterized as putting the defendant in "jeopardy" twice for a single offense. The mere admission of evidence of acts that have been the subject of an earlier prosecution does not expose the defendant to a conviction or punishment for the acquitted offense, and it cannot be described as an attempt to retry him for that offense. Although the admission of that evidence may increase the likelihood that the defendant will be convicted of the new offense, the Double Jeopardy Clause does not protect defendants from the tendency of relevant evidence to make a guilty verdict more likely.

Judicial economy, the principal basis for the doctrine of collateral estoppel, provides even less reason to extend *Ashe*. In the criminal context, the public's interest in the accuracy and justness of criminal verdicts is more important than reducing congestion in court dockets. The unavailability to the government of remedies through which it can protect itself against erroneous acquittals also weighs heavily against the extension of collateral estoppel that petitioner advocates.

B. The Due Process Clause also does not require the exclusion of Henry's testimony. A rule that the government may not introduce any evidence of facts involved in a prior criminal prosecution, regardless of the basis for a defendant's acquittal, finds no support in the "goals of the criminal justice system" on which petitioner relies. The wholesale exclusion of probative evidence that petitioner advocates would undercut, rather than advance, the reliability of fact-finding in criminal trials. There is no inconsistency between a defendant's acquittal on a criminal charge and the admission of evidence relating to that charge to establish a separate offense. Even if there were such an inconsistency, the objective of consistency in jury verdicts is not a legitimate reason to exclude otherwise relevant evidence. There is no "tradition" that an acquittal of an offense precludes all future use of evidence tending to prove that offense, and petitioner has not even remotely demonstrated that requiring the exclusion of such evidence is among those " 'fundamental conceptions of justice which lie at the base of our civil and political institutions' * * * and which define 'the community's sense of fair play and decency.' " *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

II. Even if the Constitution prohibits the admission of evidence of facts determined by a prior acquittal, there would be two alternative grounds for affirming the conviction.

First, petitioner failed to carry his burden of proving the facts on which the prior acquittal was based. Collateral estoppel applies only to issues that have been actually and necessarily decided in favor of the party seeking to invoke the doctrine, and that party has the burden of establishing a record sufficient to permit a court to identify those issues. Petitioner submitted nothing by way of evidence or argument to suggest the basis for his prior acquittal. Based on his recollection, the trial judge found that petitioner's

presence at Henry's house was not contested at the earlier trial. Because the relevance of Henry's testimony turned on petitioner's presence in the house, and not whether he committed any crimes while he was there, petitioner failed to satisfy his burden of showing that the prior acquittal was based on a finding by the jury that is inconsistent with the purpose for which the evidence was offered below.

Second, under the facts of this case, any error in admitting the evidence was harmless beyond a reasonable doubt. Both lower courts properly characterized the case against petitioner as "overwhelming"; Henry's testimony occupied only a small role in establishing that petitioner was the robber; and other factors protected petitioner from suffering any significant prejudice from the admission of the evidence.

ARGUMENT

I. EVIDENCE OF PETITIONER'S INVOLVEMENT IN A PRIOR OFFENSE WAS ADMISSIBLE EVEN THOUGH PETITIONER WAS ACQUITTED OF THAT OFFENSE AT A PREVIOUS TRIAL

A. The Doctrine Of Collateral Estoppel Did Not Bar The Admission Of Evidence Regarding Conduct As To Which Petitioner Had Been Previously Acquitted

1. The doctrine of collateral estoppel provides generally that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 153 (1979); see Restatement (Second) of Judgments § 27 (1982). Like res judicata, collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promot-

ing judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). Although it was first developed in civil litigation, collateral estoppel has become "an established rule of federal criminal law." *Ashe* v. *Swenson*, 397 U.S. at 443.[5]

The doctrine of collateral estoppel is subject to a number of exceptions—"instances in which the policies against relitigation of an issue may be overcome." Restatement (Second) of Judgments 249 (1982). One of those exceptions is controlling in this case: Even when the requirements for an estoppel are otherwise present, relitigation is permitted when the party against whom preclusion is sought "had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action." *Id.* § 28(4). To apply collateral estoppel in that situation "would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. • • • Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied." *Id.* at 281 comment f.[6]

This exception to the doctrine of collateral estoppel is most clearly applicable to acquittals in criminal cases. See Restatement (Second) of Judgments § 85 (1982). This Court has held on several occasions that an acquittal in a

[5] See *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916); *United States* v. *Adams*, 281 U.S. 202, 205 (1930).

[6] This exception could also be justified by the principle that collateral estoppel applies only to facts that were "actually and necessarily determined." *Montana* v. *United States*, 440 U.S. at 153. A jury that has resolved an issue against a party that faces a lower standard of proof in a second proceeding cannot be said to have "actually and necessarily" resolved the issue under that lesser standard.

criminal case does not estop the government from relitigating an issue when it is presented in a subsequent civil action governed by a lower standard of proof.

In *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), for instance, a defendant had been acquitted of dealing in firearms without a license. Thereafter, the government sought the forfeiture of weapons seized from the defendant, alleging that they had been used in the criminal offense of which the defendant had been acquitted. This Court unanimously rejected the defendant's contention that collateral estoppel precluded relitigation of the question whether he had committed the offense. The Court explained that an acquittal on criminal charges "does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." 465 U.S. at 361. Thus, "the jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business" (*id.* at 362). And it was "clear," the Court concluded, "that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel" (*ibid.*). Accord *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) ("The acquittal of the criminal charges may have only represented ' "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." ' • • • As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings."); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the

guilt of the accused.' • • • It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."); *Lewis* v. *Frick*, 233 U.S. 291, 302 (1914); *Murphy* v. *United States*, 272 U.S. 630, 632-633 (1926); *Stone* v. *United States*, 167 U.S. 178, 188 (1897).

The same reasoning controls this case. Petitioner's prior acquittal on the charge of robbing Henry was not a determination that petitioner had not been present in Henry's house with Christian, wearing a mask and carrying a gun. Rather, it merely signified "the existence of reasonable doubt as to his guilt." *89 Firearms*, 465 U.S. at 361.[7] The admissibility of Henry's testimony in this case was governed by a much lower standard of proof. Under *Huddleston* v. *United States*, 108 S. Ct. 1496, 1501 (1988), the district court was entitled to admit the testimony based on no more than a determination that the "jury could reasonably find • • • by a preponderance of the evidence" that petitioner was the masked intruder who had been at Henry's house with Delroy Christian.[8] The relation between this standard of proof and the standard applied in petitioner's prior criminal trial was exactly the same as in the successive proceedings in *89 Firearms*. The doctrine of collateral estoppel is equally inapplicable in both contexts. See J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[10], at 404-74, ¶ 803(22)[01], at 803-360 n.48 (1988); Note, *Evidentiary Use of Prior Acquitted Crimes: The "Relative Burdens of Proof" Rationale*, 64 Wash. U.L.Q. 189 (1986).

These principles suggest that collateral estoppel should apply against the government in a criminal case only where the government seeks to prove beyond a reasonable doubt a fact that was resolved in the defendant's favor under that standard by a prior acquittal. In this case, for example, the government was trying to prove beyond a reasonable doubt that petitioner was the person who robbed the bank. If petitioner had previously been acquitted of a related charge, such as assaulting one of the bank tellers during the course of the robbery, and if it was clear from the record that the acquittal was based on the jury's conclusion that petitioner was not the person who robbed the bank, collateral estoppel would prohibit the government from attempting to prove in a subsequent bank robbery prosecution that petitioner was the robber. That conclusion follows from the fact that the government's burden with respect to the issue of the robber's identity is the same in both cases – proof beyond a reasonable doubt. But col-

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[7] Petitioner argues that it is "not unreasonable to interpret an acquittal as reflecting a finding of innocence by the jury." Pet. Br. 42. Even if that contention were not foreclosed by this Court's cases, it would have little to recommend it. The only point on which jurors must agree to return a verdict of not guilty – and the only finding such a verdict "necessarily" reflects – is that the government failed to prove its case beyond a reasonable doubt. Even if one or more members of a jury entertained a belief that the government's proof failed to meet some lesser standard, that belief would not be recorded in the collective jury verdict. It is also fair to assume that in practice juries rarely reach a collective determination that a defendant is entirely innocent of an offense. Jury instructions routinely admonish jurors to adhere to the reasonable doubt standard, and defense counsel vigorously reinforce that message in their closing arguments. Jurors striving toward unanimity in favor of an acquittal undoubtedly focus their attention on the issue of reasonable doubt.

[8] Because the trial in this case preceded the Court's decision in *Huddleston*, the trial court actually determined the admissibility of the evidence by the more exacting "clear and convincing evidence" standard that some courts had applied to "other acts" evidence offered under Rule 404(b). J.A. 25. See 108 S. Ct. at 1499 n.2.

lateral estoppel should not apply where the fact that the evidence in the second case is offered to prove is not one that the government is required to establish beyond a reasonable doubt. Because the government was not required in the instant case to prove beyond a reasonable doubt that petitioner was the person who accompanied Delroy Christian to Henry's house, the verdict of acquittal at the first trial should not bar the admission of that evidence on collateral estoppel grounds.

To hold that collateral estoppel bars the introduction of evidence of facts as to which a jury has found a reasonable doubt would in effect establish a different standard of relevance for that evidence than for any other evidence. To illustrate, if a witness in the bank had been prepared to testify that he believed petitioner was the robber but was not sure of his identification beyond a reasonable doubt, that testimony would clearly have been admissible. Under the Rules of Evidence, the "evidentiary standard [of proof] is unrelated to the burden of proof on the substantive issues" in a criminal case. *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987). The Rules recognize that "[t]he sum of an evidentiary presentation may well be greater than its constituent parts." *Id.* at 180. Henry's testimony should be treated no differently. It met the standard of relevance applicable to evidence generally, and its admission was consistent with well-established principles of collateral estoppel.

2. This Court's decision in *Ashe* v. *Swenson* does not require a different conclusion. In that case, the State was seeking to prove a fact—the defendant's participation in a single robbery of members of a poker game—that was subject to the same reasonable doubt standard in successive prosecutions. In the first of those prosecutions, the State tried Ashe on the charge of robbing Knight, one of six members of the game. Ashe was acquitted. The State

then tried Ashe on the charge of robbing another member of the same game, and it obtained a conviction. This Court reversed the conviction, holding that the doctrine of collateral estoppel embodied in the Double Jeopardy Clause barred relitigation of the issue whether Ashe was one of the men who had robbed the game. The Court explained (397 U.S. at 445):

> the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. [Collateral estoppel], therefore, would make a second prosecution for the robbery • • • wholly impermissible.

Ashe thus held that the State could not bring a second prosecution for the robbery of a second victim at the poker game. The case did not present the question whether the State could use evidence that Ashe had been a participant in the robbery for a different purpose—for example, as evidence in a trial for an entirely separate offense. Therefore, as petitioner acknowledges (Pet. Br. 26-27), *Ashe* did not address the question presented by this case.[9]

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[9] Because it is based on the Double Jeopardy Clause, *Ashe* necessarily relied on the premise that the robbery of the second poker player was in a sense the "same offense" as the robbery of the first. Indeed, this Court subsequently explained that because of the close relationship between the two crimes, the Court considered them to be the "same offense" for purposes of the constitutional protection against double jeopardy, even though each required proof of a fact that the other did not—*i.e.*, that a different individual had been robbed. See *Brown* v. *Ohio*, 432 U.S. 161, 166-167 n.6 (1977). Obviously, the offenses involved in the present case and in the prior robbery of Henry cannot be considered to be the "same offense" under any standard.

Petitioner asks the Court to apply *Ashe* to foreclose the prosecution from introducing evidence to prove, for any purpose, a fact as to which the jury in an earlier criminal case entertained a reasonable doubt. For the Court to do so, however, would "significantly expand[ ] the *Ashe* holding." *Blackburn* v. *Cross*, 510 F.2d 1014, 1017 (5th Cir. 1975). We submit that the considerations underlying the decision in *Ashe* do not support that extension.

As petitioner points out, a number of courts of appeals have found support in *Ashe* for that extension of the doctrine of collateral estoppel.[10] Those courts have attached great weight to *Ashe*'s general observation that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (397 U.S. at 443).[11]

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[10] Before *Ashe*, an overwhelming majority of the courts to consider the issue held that an acquittal did not prohibit the use of evidence of an offense in a subsequent prosecution for a separate offense. See Annotation, *Admissibility of Evidence As to Other Offense As Affected by Defendant's Acquittal of That Offense*, 86 A.L.R.2d 1132 (1962); Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 Fla. St. U.L. Rev. 511, 522 (1974).

[11] *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 583-584 (1st Cir.), cert. denied, 108 S. Ct. 510 (1987); *United States* v. *Mespoulede*, 597 F.2d 329, 332 (2d Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209, 212 (5th Cir. 1972); *United States* v. *Mock*, 604 F.2d 341, 343 (5th Cir. 1979); *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Whitaker*, 702 F.2d 901, 903 (11th Cir. 1983); *Albert* v. *Montgomery*, 732 F.2d 865, 869 (11th Cir. 1984); *United States* v. *Gornto*, 792 F.2d 1028, 1031 (11th Cir. 1986); *United States* v. *Day*, 591 F.2d 861, 868 (D.C. Cir. 1978).

The Third Circuit, as its decision in this case reflects (J.A. 45-46), apparently does not understand the application of collateral estoppel to

That shorthand characterization of the rule of collateral estoppel cannot fairly be read to have swept away the recognized exceptions to the doctrine. In particular, the Court's decisions in *89 Firearms, One Lot Emerald Cut Stones*, and *Helvering* v. *Mitchell* make it clear that issues of ultimate fact resolved by a valid and final judgment in a criminal case *can* again be litigated in a subsequent civil lawsuit governed by the preponderance of the evidence standard—notwithstanding *Ashe*'s reference to "any future lawsuit."[12] Several federal courts of appeals have refused to apply collateral estoppel to foreclose the introduction of evidence of offenses of which a defendant has been acquitted.[13] And the better reasoned cases at the state

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this type of case to involve the constitutional principles recognized in *Ashe*. See *United States* v. *Keller*, 624 F.2d at 1157-1160.

The Sixth Circuit has not made clear what it regards as the source of its rule foreclosing the use of evidence in the second of two criminal trials. Compare *United States* v. *Johnson*, 697 F.2d 735, 739-741 (1983), with *Rice* v. *Marshall*, 816 F.2d 1126, 1130 (1987).

[12] Petitioner's reliance (Pet. Br. 38) on *Ashe*'s quotation from *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961), is also misplaced. The principal authority for the statement quoted from *Kramer* was the Court's decision in *Coffey* v. *United States*, 116 U.S. 436, 442-443 (1886), a decision that the Court overruled in *89 Firearms*. 465 U.S. at 361. In light of that development, *Kramer* is no longer good law to the extent that it suggested that a difference between the standards of proof in successive proceedings is immaterial to the application of collateral estoppel. *Ashe*'s reliance on *Kramer* must be viewed as similarly qualified.

[13] *United States* v. *Kills Plenty*, 466 F.2d 240 (8th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Riley*, 684 F.2d 542, 546 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); *Flittie* v. *Solem*, 775 F.2d 933, 942 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Castro-Castro*, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Rocha*, 553 F.2d 615, 616 (9th Cir. 1977); *United States* v. *Van Cleave*, 599 F.2d 954, 957

court level have recognized that the difference in the burdens of proof applicable to the trial of an offense and to the introduction of evidence of acts relevant to the offense in a later prosecution for a separate offense makes *Ashe* inapplicable in a case like this one.[14]

In short, we believe that the constitutional rule in *Ashe* does not require an expansion of the principles of collateral estoppel as they apply to criminal cases. Thus, *Ashe* applies only to cases in which the government seeks to prove beyond a reasonable doubt a fact resolved in the defendant's favor under that standard by a prior acquittal. It is only in that situation that traditional principles of collateral estoppel would foreclose relitigation of an issue. That limitation on the scope of *Ashe* is also compelled by the constitutional theory on which *Ashe* is based, because unless two offenses are sufficiently similar as to require proof of a common fact beyond a reasonable doubt, they cannot conceivably be characterized as the "same offense" for purposes of the Double Jeopardy Clause. See *Brown* v. *Ohio*, 432 U.S. at 166-167 n.6. There is no textual, historical, or other basis for extending the prohibition on double jeopardy to a second prosecution that lacks even that connection to a prior criminal proceeding.

(10th Cir. 1979); *Holt* v. *United States*, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969).

[14] See *State* v. *Smith*, 271 Or. 294, 296, 532 P.2d 9, 10 (1975); *State* v. *Fielders*, 124 N.H. 310, 313-314, 470 A.2d 897, 898-900 (1983).

Although decisions of the federal courts of appeals have largely deprived state courts of their freedom of choice on this issue, a clear majority of the state courts that have spoken to the question before or after *Ashe* have the permitted use of evidence of conduct relevant to an offense of which a defendant has been acquitted. See Annotation, *Admissibility of Evidence As to Other Offense As Affected by Defendant's Acquittal of That Offense*, 25 A.L.R.4th 934 (1983).

3. Petitioner argues (Pet. Br. 31, 32-34) that his proposed extension of *Ashe*, even if not compelled by the Double Jeopardy Clause itself, is consistent with the values that underlie that Clause. He argues that to permit the introduction of evidence such as Henry's testimony would violate the "underlying idea" of the protection against double jeopardy, which is:

> that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187 (1957). Similarly, petitioner contends that admitting evidence of an offense of which a defendant has been acquitted allows "the state to utilize an initial trial as a 'dry run for a subsequent one' " (Pet. Br. 31 (quoting *Ashe* v. *Swenson*, 397 U.S. at 447)), that it amounts to a "[retrial] for the same conduct" (Pet. Br. 34), and that it places him in "jeopardy" for the acquitted offense (Pet. Br. 36-37 & nn.37-38).

All of these arguments suffer from the same basic flaw. The Double Jeopardy Clause prohibits subjecting a defendant "for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. Thus, the values it expresses reach only the situation in which a defendant can fairly be described as being threatened with "jeopardy" for an offense on which he has earlier been tried. They cannot justify reworking the prohibition against successive prosecutions for a single offense into a rule restricting the admissibility of evidence in prosecutions for entirely separate offenses.

The Court's cases have defined "jeopardy" in a way that makes that concept completely inapplicable to a defendant's mere exposure to evidence of an offense for which he is not on trial. The risk to which the term "jeopardy" refers "is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'" *Breed* v. *Jones*, 421 U.S. 519, 529 (1975) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943)). "Without risk of a determination of guilt, jeopardy does not attach." *Serfass* v. *United States*, 420 U.S. at 391-392. Contrary to petitioner's suggestion, the bank robbery trial did not expose petitioner to any "risk" of conviction or punishment for any offenses arising from the incident at Henry's house. Rather, he faced only the risk that the jury would find Henry's testimony credible and rely on it in inferring that petitioner was the masked robber at the bank. In that respect, Henry's testimony was no different from any other evidence that could have been introduced to identify petitioner as the bank robber.

The policies underlying the Double Jeopardy Clause do not protect a defendant from the likelihood that relevant evidence will contribute to a conviction—or from any "embarrassment," "expense," "ordeal," "anxiety," and "insecurity" (*Green* v. *United States*, 355 U.S. at 187) that may accompany that prospect. And, by the same token, the mere evidentiary use of prior conduct of which a defendant has been acquitted does not threaten the type of official oppression at which the Double Jeopardy Clause was aimed. The admission of such evidence in cases like this one does not involve "repeated attempts to convict an individual for an alleged offense" (*Green* v. *United States*, 355 U.S. at 187), for the simple reason that at the trial in this case, petitioner was not exposed to conviction for the Henry robbery.

Petitioner's double jeopardy argument is based on the premise that the introduction of Henry's testimony about petitioner's appearance with Christian at her house, which was admitted for the sole purpose of identifying petitioner as the person who robbed the First Pennsylvania Bank, is indistinguishable in constitutional terms from the inclusion of a separate count charging petitioner for a second time with offenses arising from the incident at Henry's house. That premise is invalid, and with it falls petitioner's reliance on the policies underlying the Double Jeopardy Clause.

4. Petitioner also invokes the values underlying the doctrine of collateral estoppel to support his argument for an extension of *Ashe*. Pet. Br. 31-32, 33. It is anomalous to suggest, however, that those values would now justify abrogating the long-established exception to the doctrine on which we rely. In any event, the policies underlying the doctrine of collateral estoppel—the avoidance of duplicative litigation, judicial economy, and the avoidance of inconsistent judgments—cannot support giving an acquittal more preclusive effect in criminal proceedings than *89 Firearms* prescribes for civil proceedings.

To the contrary, the differences between criminal and civil cases weigh in favor of a cautious application of collateral estoppel in the criminal context, not a broader application. That point is well illustrated by *Standefer* v. *United States*, 447 U.S. 10 (1980), in which this Court refused to extend the doctrine of non-mutual collateral estoppel to criminal cases, because of special consideration applicable in the criminal context.[15] Because the

[15] In *Standefer*, a defendant charged with aiding and abetting a criminal offense argued that the alleged principal's acquittal estopped the government from relitigating, in the aider and abettor's trial, the question whether the principal had committed that offense. In one respect, the argument for the application of collateral estoppel was

government in criminal cases does not enjoy the rights available to other litigants to correct jury verdicts that are against the evidence or based on "passion and prejudice," the Court held that collateral estoppel must be applied more sparingly against the government in criminal cases than in private civil litigation. *Id.* at 23. The absence of a "full and fair opportunity to litigate," the Court explained, "strongly militates against giving an acquittal preclusive effect." *Ibid.*[16] A criminal case also "involves 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine." 447 U.S. at 25. " 'The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases * * *. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public.' " *Ibid.*

All of these factors weigh against the extension of the *Ashe* case that petitioner advocates here. Moreover, they answer petitioner's contention (Pet. Br. 23 & n.24, 37-38) that a criminal judgment is entitled to more preclusive

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substantially stronger in *Standefer* than it is here; in *Standefer* the government was attempting in the second trial to prove beyond a reasonable doubt a fact—the principal's participation in the offense—as to which the prior jury had necessarily found a reasonable doubt. The Court nevertheless refused to preclude the government from relitigating the principal's actions in the alleged aider and abettor's trial.

[16] See *Montana* v. *United States*, 440 U.S. at 164 n.11 ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."); Restatement (Second) of Judgments § 28(1) (1982) (collateral estoppel does not apply where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action").

effect in a subsequent criminal case than in the civil proceedings at issue in *89 Firearms*.

5. Finally, relying on what he describes as a "long established common law principle" that evidence admitted under Fed. R. Evid. 404(b) "is not favored" (Pet. Br. 35), petitioner argues that the constitutional doctrine of collateral estoppel should be extended so as to "minimize the possibility that a jury will decide a defendant's guilt on the basis of extraneous and prejudicial other crimes evidence" (*id.* at 36-37). Petitioner's analysis ignores the fact that the Federal Rules of Evidence are congressionally mandated directions to the courts that specify the extent to which such evidence is or is not admissible and provide the means for dealing with any potential prejudice. The Rules are not general policy statements that can be overridden when other competing policies or "common law principles" seem more appealing. Just as clearly, those principles cannot be used to manipulate other doctrines, such as collateral estoppel, with the goal of producing results different from those that the Rules of Evidence prescribe.[17]

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[17] Any attempt to draw a sharp line between the category of evidence encompassed by Rule 404(b) and other relevant evidence is inherently artificial. In this case, for instance, Henry's testimony was introduced not only to prove that petitioner had engaged in a "similar act" after the bank robbery, but also as "classic circumstantial evidence" (J.A. 24) linking him with Christian. Assuming that a special rule of collateral estoppel were justified for "other acts" evidence, it is uncertain whether it would be applicable to this case.

Moreover, although collateral estoppel is often invoked in response to an attempt to introduce evidence of similar acts under Fed. R. Evid. 404(b), disputes over its applicability are not limited to that context. Courts have sometimes held that collateral estoppel is applicable when a defendant is acquitted on certain counts in an indictment, and a second trial is necessary on others because of a severance, a mistrial, or a conviction followed by a reversal on appeal that permits retrial. See, *e.g.*, *United States* v. *Corley*, 824 F.2d 931 (11th Cir. 1987); *United*

In *Huddleston*, this Court rejected the notion that the potential prejudice that may accompany "other acts" evidence justifies subjecting that evidence to a special standard of relevance. That argument, the Court said, is "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b)." 108 S. Ct. at 1500. The Court explained that a defendant's protection against prejudice was to be found in "four other sources" recognized by the rules: Rule 404(b)'s requirement that the evidence be admitted for a proper purpose; the requirement of relevancy applicable to all evidence; Fed. R. Evid. 403, which permits the exclusion of evidence whose probative value is substantially outweighed by its prejudicial effect; and jury instructions limiting the jury's consideration of evidence to the purpose for which it was properly admitted. 108 S. Ct. at 1502.

Those same evidentiary principles are sufficient to protect defendants from any prejudice that may accompany evidence that pertains to offenses of which the defendant has been acquitted. And, by contrast with petitioner's sweeping rule of absolute exclusion, they provide far more discriminating means for courts to accommodate the general principle that all relevant evidence should be admissible (see Fed. R. Evid. 402) with the defendant's interest in avoiding unfair prejudice.

This case illustrates the effectiveness of the techniques that are available to trial judges under the Rules of Evidence. The trial court addressed the admissibility of Henry's testimony before trial and specifically found both that it was relevant to the issue of the bank robber's

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States v. *Mespoulede*, 597 F.2d at 336-337. But see, *e.g.*, *United States* v. *Smith*, 337 A.2d 499, 501-503 (D.C. 1975). Our view is that collateral estoppel should play no role in such cases. See *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984).

identity and that its probative value outweighed its prejudicial effect. The court admonished the prosecutor to limit Henry's testimony to the particulars tending to show that petitioner was the bank robber—his presence in Henry's house with Christian and the fact that petitioner was wearing a mask and carrying a gun. Both when Henry testified and when the court delivered its final jury charge, the court advised the jury of petitioner's acquittal and of the limited purpose of the testimony. Protective measures of that kind are sufficient to guard against prejudice arising from evidence encompassed by Rule 404(b), even if the evidence relates to offenses of which the defendant has been acquitted.

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In conclusion, the doctrine of collateral estoppel, the Double Jeopardy Clause, and the values each expresses were no obstacle to the admission of Henry's testimony. The verdict in petitioner's trial for offenses arising from the incident at Henry's house determined only that petitioner was not proved guilty beyond a reasonable doubt. That determination did not foreclose the showing of relevance needed to admit Henry's testimony in this case, which was governed by a lower standard of proof. The government did not, as in *Ashe*, seek to prove beyond a reasonable doubt a fact that had been determined in petitioner's favor under that standard. The admission of Henry's testimony did not place petitioner in "jeopardy" for offenses of which he had been acquitted or otherwise implicate the values underlying the Double Jeopardy Clause. The admission of the evidence was thus governed solely by the Rules of Evidence. The trial court scrupulously adhered to the terms of those Rules, and it took a variety of steps to protect petitioner from the possibility that jurors might employ the evidence for a purpose pro-

hibited by Fed. R. Evid. 404(b) or might entertain a mistaken impression as to the disposition of those charges.[18] The court of appeals erred when it held that the prior acquittal foreclosed the admission of the evidence, and petitioner's conviction should be upheld on that ground.

B. The Due Process Clause Does Not Bar The Admission Of Evidence Of Offenses Of Which A Defendant Has Been Acquitted

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has very limited operation. As the Court observed in *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977):

> Judges are not free, in defining "due process," to impose on law enforcement officials [their] "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin* v. *California*, 342 U.S. 165, 170 (1952). * * *

[18] To be sure, the court of appeals held, in the alternative, that Henry's testimony was inadmissible under the Rules of Evidence, either because it was not relevant or because its prejudicial effect outweighed its probative value. J.A. 44-45. However, the court's reasoning makes it clear that those determinations embodied the same error concerning the effect of the prior judgment as the court's ruling on collateral estoppel. The court's finding on relevance was based on its view that, after petitioner's acquittal, "a second jury should not be permitted" to conclude that petitioner was the intruder at Henry's house. J.A. 44. Likewise, the court of appeals' balance of probative value and prejudice reflected its view that "the jury's verdict in the Henry occurrence must be taken to signify that it was not proven that [petitioner] committed the 'bad' act charged." J.A. 45. Because the court's purported evidentiary rulings depended on the same mistaken assessment of the effect of petitioner's acquittal as the court's ruling on collateral estoppel, those rulings cannot stand as an alternative basis for excluding the evidence.

> [They] are to determine only whether the action complained of * * * violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin* v. *California*, *supra*, at 173.

Petitioner argues that due process prohibits the use of *any* evidence that tends to prove an offense of which a defendant has been acquitted, regardless of the theory of defense that prevailed in the first trial—an inquiry that petitioner downplays as "the often convoluted collateral estoppel analysis." Pet. Br. 23; see *id.* at 14 n.18. This contention is strikingly broad in two respects: it would attribute to the Due Process Clause a limitation on successive prosecutions that is not even remotely grounded in principles of double jeopardy, and it would forgo even the analysis that *Ashe* found necessary to bar relitigation of issues in a criminal case. Petitioner cannot establish that this type of broad immunity from probative evidence is a "fundamental" aspect of fair criminal proceedings or that it is mandated by the "goals of the criminal justice system" that he invokes. Pet. Br. 15, 18.

1. The evidentiary immunity petitioner advocates would undercut, rather than advance, the reliability of fact-finding in criminal trials. See Pet. Br. 18-19. First, it would exclude even evidence on which a verdict of acquittal casts no doubt whatever. In this case, for instance, petitioner's rule would have required the exclusion of Henry's testimony even if a careful review of the record of his prior trial had established that he had been acquitted on some ground other than his not having been present with Christian in Henry's house. There is no legitimate, let alone "fundamental," interest in the exclusion of testimony and physical evidence whose probative value is not even in question as a result of a prior acquittal.

Second, even if it were limited to facts as to which a jury has demonstrably entertained a reasonable doubt in an earlier prosecution, petitioner's proposed rule would undercut the reliability of the fact-finding process. Criminal trials are conducted on the well-founded assumption that reliable fact-finding is most likely to occur when "[a]ll relevant evidence is admissible." Fed. R. Evid. 402. If evidence meets the test of relevance, and if its admission would not violate a privilege or other legal right, doubts about reliability are resolved by allowing the opposing party to cross-examine, to submit countervailing evidence, and to argue against the inferences that the other party's evidence is said to support. Petitioner's proposed rule, by contrast, would deny the jury any opportunity to consider evidence that meets the test of admissibility applicable to all other proof. Petitioner's rule is therefore contrary to the principal guarantee of reliable fact-finding—permitting the jury to hear from both sides all of the facts that may assist it in reaching a verdict.

Contrary to petitioner's suggestion (Pet. Br. 18-19), the admission of evidence that resulted in an acquittal at an earlier trial is not analogous to the use at trial of a void conviction. When a conviction is used at trial, whether to trigger a recidivist statute or to impeach credibility in accordance with Fed. R. Evid. 609, it is conclusive as to the fact of the conviction and the defendant's guilt of the crime.[19] The defendant has no opportunity to prove that he did not commit the offense. Evidence that resulted in an earlier acquittal, by contrast, is not conclusive on any point, but is subject to challenge by the defendant by any appropriate means.

[19] See Rule 609 Advisory Committe note, 28 U.S.C. App. at 703 ("As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act.").

Moreover, when a prior conviction is void for constitutional reasons, such as the defendant's lack of representation by counsel at trial, the conviction is considered factually unreliable, since it was not the product of a constitutionally fair adjudication. That problem of reliability is inapplicable to evidence of the sort involved in this case. The jury was free to assess the truthfulness and the significance of Henry's testimony, and petitioner was free to attempt to show that the evidence was either false or insignificant. Nor did the process of obtaining that testimony involve any error that could have irreparably undercut its reliability. See *Simmons* v. *United States,* 390 U.S. 377, 384 (1968) (due process bars the admission of in-court identification only if impermissibly suggestive pretrial identification procedures gave rise to "very substantial likelihood of irreparable misidentification").

Finally, reliance on a conviction that is invalid because it was obtained when the defendant was unrepresented "erodes the principle" that a defendant is entitled to counsel and requires him to "suffer[ ] anew from the deprivation of that * * * right." *Burgett* v. *Texas,* 389 U.S. 109, 115 (1967). See *Loper* v. *Beto,* 405 U.S. 473, 481 (1972) (plurality opinion); *United States* v. *Tucker,* 404 U.S. 443, 449 (1972). By contrast, in this case the government did not obtain Henry's testimony through any violation of petitioner's constitutional rights; the exclusion of the evidence in this case is therefore not required in order to avoid perpetuating the effects of a prior constitutional violation.[20]

[20] Contrary to petitioner's claim (Br. 19-20), the admission of Henry's testimony had no effect whatever on the government's burden of proving petitioner guilty of the bank robbery beyond a reasonable doubt, and thus no tendency to increase the likelihood of an erroneous conviction for that offense. See generally *In re Winship,* 397 U.S. 358 (1970); *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975).

2. Petitioner's proposed rule cannot be justified by the "goal of consistency in jury verdicts." Pet. Br. 20. At the outset, there is no inconsistency between petitioner's acquittal on the charge of robbing Henry and a conviction on the charges in this case, even though his conviction may have been based in part on the evidence that he accompanied Christian to Henry's house wearing a mask and carrying a gun. The bank robbery conviction did not entail any judgment by the jury with respect to offenses that may have occurred at Henry's house, since the jury in this case made no collective finding as to petitioner's guilt or innocence of robbing Henry. Their only joint determination—that petitioner was guilty beyond a reasonable doubt of offenses associated with the bank robbery—was neither foreclosed by, nor inconsistent with, the prior not guilty verdict.

Even if the verdict in this case were inconsistent with petitioner's prior acquittal, the Court's cases establish that inconsistency in jury verdicts is a fact of life in the criminal justice system, not a basis for creating new rights for criminal defendants. *Standefer* v. *United States, supra; United States* v. *Powell,* 469 U.S. 57 (1984). In *Standefer,* the Court refused to vacate a conviction on a charge of aiding and abetting an alleged offense even though a different jury had acquitted the principal. The Court explained that this result was consistent with the "appearance of justice" and continued (447 U.S. at 25):

> This case does no more than manifest the simple, if discomforting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Roth* v. *United States,* 354 U.S. 476, 492, n.30 (1957). While symmetry of results may be intellectually satisfying, it is not required.

Similarly, in *United States* v. *Powell*, the Court reaffirmed the "established principle" that inconsistency in a jury's verdicts on separate counts in an indictment does not warrant disturbing convictions on the counts as to which the jury returned guilty verdicts. 469 U.S. at 63.[21]

3. Finally, petitioner contends that the introduction of evidence of an offense of which the defendant has been acquitted violates "commonly accepted notions of fair play," a "tradition * * * that a person tried and acquitted of a crime should not again be forced to defend that accusation in a subsequent criminal proceeding," and "fundamental notions of fairness." Pet. Br. 16-17, 24-25. To the extent that those concerns are of constitutional magnitude, however, they are fully expressed in the Double Jeopardy Clause. The Due Process Clause is not a device for freely extending the prohibition against double jeopardy to cases involving only the admission of the same evidence in two successive criminal proceedings.

Before the Court held the Double Jeopardy Clause applicable to the States through the Fourteenth Amendment (see *Benton* v. *Maryland*, 395 U.S. 784 (1969)), due process was held to prohibit only those successive prosecutions that subjected a defendant to "a hardship so acute and shocking that our polity will not endure it." *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937). Moreover, the judgment as to whether a second prosecution was fundamentally unfair was not decided in terms of "any over-all

[21] The Court explained that inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense," that "the Government has no recourse if it wishes to correct the jury's error," that jury verdicts may reflect the exercise of lenity, and that criminal defendants are afforded protection "against jury irrationality or error" by the courts' review of the sufficiency of the evidence of guilt. 469 U.S. at 64-67. In light of those factors, the Court held, the "best course to take is simply to insulate jury verdicts from review on this ground." *Id.* at 68-69.

formula"—*i.e.*, in terms of broad rules like the one proffered by petitioner—but rather " 'in the facts and circumstances of each case.' " *Hoag* v. *New Jersey*, 356 U.S. 464, 468 (1958) (quoting *Brock* v. *North Carolina*, 344 U.S. 424, 427-428 (1953)). Under these tests, due process was held to permit state prosecutions that would have been flatly prohibited by the Double Jeopardy Clause. In fact, in *Hoag*, a case with facts indistinguishable from those of *Ashe* v. *Swenson*, the Court expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement." 356 U.S. at 471.

Those decisions were overruled when the Court "incorporated" the guarantee against double jeopardy in the Due Process Clause of the Fourteenth Amendment. However, they foreclose petitioner's contention that notions of "fundamental fairness" provide more protection from successive prosecutions than is guaranteed by the Double Jeopardy Clause. As *Lovasco* reflects, the standard that the Court applied in *Palko*, *Hoag*, and *Brock* is still the test applicable to claims, like petitioner's, that cannot be brought under one of the specific guarantees in the Bill of Rights.[22] Petitioner cannot satisfy that test on the facts of this case.

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[22] In *Showery* v. *Samaniego*, 814 F.2d 200, 204 (1987), the Fifth Circuit "decline[d] to find the collateral estoppel doctrine cognizable as a constitutional claim apart from those claims that are recognized under the double jeopardy clause." In *Showery*, the State had failed to carry its burden at a bond revocation hearing of showing by a preponderance of the evidence that a defendant had committed an offense while free on an appellate bond. The defendant argued that under the doctrine of collateral estoppel that determination should bar the State from prosecuting him for that offense. The court rejected that contention. But cf. *United States ex rel. DiGiangiemo* v. *Regan*, 528 F.2d 1262, 1265-1266 (2d Cir. 1975) (due process requires State to give collateral estoppel effect to determination that evidence was obtained through a violation of the Fourth Amendment), cert. denied, 426 U.S. 950 (1976).

Rather than reflecting an "acute and shocking" form of unfairness, the admission of the Henry evidence in this case actually promoted the interest in fair and evenhanded adjudication. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). The public has a paramount interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969).

Petitioner makes no serious effort to demonstrate that a rule excluding all evidence relevant to an offense of which a defendant has been acquitted occupies any place in the traditions of fairness that have grown up around a criminal trial or that such a rule could be regarded as "fundamental" in the sense required by the Due Process Clause.[23] Recognition of such a rule would undercut the reliability of fact-finding in criminal cases by excluding relevant evidence, it would subordinate the goal of just judgments in criminal cases to a misplaced concern for consistency in jury verdicts, and it would miscast the values that support a ban on successive prosecutions for a single offense as the basis for a transactional evidentiary immunity in successive prosecutions for different offenses.

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[23] In fact, before *Ashe*, the proposition that an acquittal did not bar introduction of evidence of an offense was "upheld by the great weight of authority throughout the country." *State* v. *Yormark*, 117 N.J. Super. 313, 337, 284 A.2d 549, 560 (1971) (citing many cases). See Annotation, 86 A.L.R.2d 1132.

II. EVEN IF THE CONSTITUTION PROHIBITS THE ADMISSION OF EVIDENCE OF AN OFFENSE OF WHICH A DEFENDANT HAS BEEN ACQUITTED, PETITIONER'S CONVICTION SHOULD BE AFFIRMED

If the Court concludes that Henry's testimony should have been excluded, it could reach that conclusion on either constitutional or nonconstitutional grounds. If the Court rejects petitioner's constitutional contentions but concludes that Henry's testimony should have been excluded on nonconstitutional grounds, petitioner's conviction would have to be affirmed, because in that event, as petitioner concedes (Br. 10-11 n.2), the court of appeals would be correct in applying the harmless error standard for nonconstitutional errors and finding the error harmless. On the other hand, if the Court concludes that the admission of Henry's testimony violated the Constitution, a more stringent harmless error standard would be applicable—requiring that the error be shown to be harmless beyond a reasonable doubt. See *Chapman* v. *California, supra*. Because the court of appeals' harmless error ruling was based on the less restrictive harmless error standard, the court of appeals' analysis of the harmless error issue would not be dispositive. The Court would then have to consider two further questions on which the validity of petitioner's conviction would turn. The resolution of either question in the government's favor would require affirmance of the judgment below.

A. Petitioner Failed To Carry His Burden of Establishing A Right to Invoke Collateral Estoppel

The courts of appeals are in agreement that the defendant bears the burden of establishing that collateral estoppel bars the admission of particular evidence. *E.g., United States* v. *Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988); *United States* v. *Ragins*, 840 F.2d 1184, 1194 (4th Cir. 1988); *United States* v. *Mock*, 640 F.2d 629, 631 n.5 (5th Cir. 1981); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Baugus*, 761 F.2d 506, 508 (8th Cir. 1985); *United States* v. *Lasky*, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Hewitt*, 663 F.2d 1381, 1387 (11th Cir. 1981). Moreover, as the Ninth Circuit explained in *Lasky*, 600 F.2d at 769, it is not enough for the party seeking to invoke collateral estoppel simply to advert to the decision of the earlier court; rather the party must provide a sufficient basis for the trial court "to pinpoint the exact issues previously litigated."[24]

Petitioner thus had the burden in this case of making a record from which the courts below could determine the basis for petitioner's prior acquittal. In particular, petitioner bore the burden of persuading the court that a rational jury could not have " 'grounded its verdict upon an

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[24] Petitioner acknowledges (Br. 41) that it is normally the defendant's burden to prove affirmative defenses based on collateral estoppel and double jeopardy. Nevertheless, relying on a reference in the Advisory Committee note to Fed. R. Evid. 401, he contends (Br. 41-42) that the drafters of the Rules of Evidence intended to reverse that burden when those defenses are raised in an effort to have evidence excluded. The statement on which he relies is the Committee's observation that relevancy "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee note to Rule 401, 28 U.S.C. App. at 688. That comment does not even remotely support petitioner's argument on the burden of proof issue. The reference to matters that are "properly provable" is plainly a shorthand description of what the Rule refers to as "any fact that is of consequence to the action." Fed. R. Evid. 401. The drafters could not have intended the unelaborated reference to "properly provable" matters to impose on the party offering evidence the burden to anticipate and rebut affirmative defenses, when the law had long placed that burden on the party opposing the admission of the evidence.

issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. at 444.

In this case, petitioner offered nothing to the court, by way of evidence or argument, to suggest what issues the jury must have resolved at the prior trial. The only basis for determining what the prior acquittal resolved was the recollection of the trial judge who heard both cases. His interpretation of the prior verdict would not have foreclosed Henry's testimony, even if *Ashe* v. *Swenson* were extended to this type of case. He stated that in his view, "[petitioner] was not acquitted on the issue of identification" (J.A. 21), and added (*ibid.*):

> Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think, took the stand.

On that state of the record, petitioner has failed to satisfy his burden of establishing a right to invoke collateral estoppel to exclude Henry's testimony. If petitioner's presence in the Henry house with Delroy Christian was not in dispute, as the district court found, the most plausible explanation for the verdict is that the jury concluded that petitioner's conduct at Henry's house did not satisfy the legal definitions of burglary, robbery, and assault. If that were accepted as the basis for the jury's verdict, Henry's testimony would not be excludable, since the relevance of that testimony did not turn on whether petitioner committed any crimes on that occasion; instead, the evidence was relevant principally because it showed petitioner's association with Christian and his possession of a mask similar to the one used in the bank robbery. Thus, the record in this case will not sustain the finding necessary for the application of collateral estoppel—*i.e.*, that the jury actually and necessarily determined the issue

material to this case in petitioner's favor. Therefore, even if the Court rejects our principal submission in this case, the judgment of the court of appeals affirming petitioner's conviction should be upheld on this basis.[25]

B. The Admission Of Henry's Testimony Was Harmless Beyond A Reasonable Doubt

If the Court concludes that the district court's admission of Henry's testimony rose to the level of constitutional error, and that petitioner met his burden of establishing the right to invoke collateral estoppel, there would remain the question whether that error was harmless beyond a reasonable doubt. Although the Court could of course remand the case to allow the court of appeals to consider that question, we believe that it is clear that any error in admitting Henry's testimony was harmless beyond a reasonable doubt, and in light of the protracted nature of the proceedings in this case, we submit that the Court may wish to address the harmless error issue itself. See *United States* v. *Lane*, 474 U.S. 438, 450 (1986).

1. Both the district court and the court of appeals agreed that the evidence of petitioner's guilt was "overwhelming" (J.A. 46; 9/25 Tr. 16). That was a fair characterization of the three eyewitness identifications and strong circumstantial case that the government presented.

Messer saw the bank robber leave the bank and remove his mask while driving away in the taxi van. Messer had "a clear recollection in [his] own mind of what the face of the man looked like" (9/22 Tr. 198). Messer also "knew I was trying to identify somebody, looking for a feature or a

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[25] As the party defending the lower court's judgment, the United States "may rely on any matter appearing in the record in support of" that judgment. *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982). See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986).

face or something like that, because I know I would have to say something to the police officials or give a description or something like that" (9/22 Tr. 194). He also testified that it was a clear afternoon and that there was "no obstruction" of his view of the bank robber as he removed his mask (9/22 Tr. 194-195).

Pichardo's in-court identification was also strong. She testified, "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks" (9/22 Tr. 246). And Rosario also made an unequivocal in-court identification of petitioner as the person driving the taxi van (9/23 & 9/24 Tr. 16, 37). Thus, petitioner was identified at trial as the bank robber by three witnesses.[26]

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[26] Contrary to petitioner's suggestion (Pet. Br. 6-7), the force of this identification testimony was not significantly undercut by the fact that the witnesses did not identify petitioner in some of the pretrial identification procedures. Each of the witnesses selected petitioner's picture from one or more pretrial photo arrays. 9/22 Tr. 205-206, 210-213 (Messer); 9/22 Tr. 247-248, 256 (Pichardo); 9/22 & 9/23 Tr. 9-13, 15 (Rosario). Moreover, the witnesses provided entirely plausible explanations for their failure to identify petitioner during other pretrial identification procedures. Despite extensive cross-examination, their explanations were not seriously undercut.

First, none of the witnesses chose petitioner at a lineup. However, the results of that lineup were suspect, since the witnesses viewed the lineup through an office window that, at least one feared, could have permitted the members of the lineup to see them. 9/22 Tr. 212. All three witnesses testified to being scared in that setting. 9/22 Tr. 212 (Messer—"scared like the dickens"); 9/22 Tr. 254-256 (Pichardo—"put down my face * * * [and] covered my eyes"); 9/23 & 9/24 Tr. 14-15 (Rosario). All three witnesses later selected petitioner's photograph from an array made up of the participants in the lineup. 9/22 Tr. 212, 256; 9/23 & 9/24 Tr. 15, 134-136.

Second, Pichardo and Rosario did not immediately advise the police that they recognized petitioner's picture in one of the photo arrays each of them was shown. 9/22 Tr. 252-253; 9/23 & 9/24 Tr. 12. However, both testified that they had recognized petitioner's picture in the array, but did not make an identification because they did not want to become involved. 9/22 Tr. 254; 9/23 & 9/24 Tr. 12-13. Pichardo subsequently went to see a police officer she knew and told him she had actually recognized a picture in the array she had been shown. 9/22 Tr. 252-253.

The totality of this identification testimony warranted the description both lower courts gave it—"overwhelming."

The eyewitness identification testimony was buttressed by circumstantial proof that petitioner planned to use the white Volkswagen as the getaway car. Even without Henry's testimony, the government proved that petitioner had borrowed the white Volkswagen, that on the morning of the robbery it was occupied by a man matching the bank robber's description, that it was present in the vicinity of the bank near the time of the bank robbery, but that the occupants of the Volkswagen drove off when they attracted the attention of the police, and that the robber's movements suggested that he was looking for, but could not find, a planned getaway car.

2. The court of appeals also correctly determined that in the context of this trial there was little likelihood that the jury could have put the Henry evidence to any inappropriate use. When petitioner took the stand, he was impeached with evidence of a prior bank robbery conviction. J.A. 49. The possibility is remote, in view of the district court's repeated instructions as to the limited purpose of Henry's testimony and the fact of the acquittal, that Henry's testimony led any juror to alter his or her view about petitioner's propensity to commit crimes or to reach a verdict on that basis. Accordingly, even if it was constitutional error to admit Henry's testimony, any such error was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 88-6025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. The Government Too Lightly Dismisses The Double Jeopardy And Collateral Estoppel Concerns Present In This Case.

1. The Government puts forth several propositions in support of its contention that the provisions of the double jeopardy clause are inapplicable to the admission of prior acquittal evidence. First, in the view of the Government, the introduction of evidence concerning offenses for which a defendant has been acquitted "cannot be described as an attempt to retry him for that offense." (Br. Resp. 11). The Government reasons that since the petitioner was being tried for the robbery of the First Pennsylvania Bank double jeopardy is inapplicable as this is not the "same offense" for which he was acquitted.[1] (Br. Resp. 11). Finally, since petitioner was not being "punished" for the Henry incident, he was therefore not placed in "jeopardy" within the meaning of double jeopardy. (Br. Resp. 24). Arguing from its premise that the introduction of the Henry evidence did not come within the "same offense" and/or "jeopardy" provisions of the double jeopardy clause, the Government contends the policies underlying that protection are inapplicable. (Br. Resp. 24).

2. The Government's argument essentially can be capsuled into a contention that the introduction of the Henry evidence at petitioner's bank robbery trial did not put him in "jeopardy" since he was not being tried for the alleged

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[1] *Ashe* v. *Swenson*, 397 U.S. 436 (1970) would seem to foreclose the "same offense" argument. Further, in one sense petitioner, unlike Ashe, indeed did have to defend the exact same offense for which he had been acquitted.

Henry robbery.[2] Noting the qualitative similarities between the situation presented here and that which attaches when a defendant is being tried for the specific offense, the Courts of Appeal applying collateral estoppel to the evidentiary use of acquitted conduct have rejected the Government's proposed distinction. (Pet. Br. 33-34).

Indeed, since in the view of petitioner he was placed in jeopardy in reference to the Henry incident by introduction of the Henry evidence at the bank robbery trial, it could be argued that the introduction of this evidence deprived the defendant of his Fifth Amendment protection against double jeopardy without resort to collateral estoppel analysis. "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with the criminal prosecution." *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Double jeopardy not only prohibits double punishment but also prevents the Government from attempting to impose punishment on an individual who has been acquitted. See *Helvering* v. *Mitchell*, 303 U.S. 391 (1938); *United States* v. *Halper*, 109 S.Ct. 1892 (1989). A "criminal punishment" is one normally associated with a criminal proceeding. *United States* v. *Halper, Id.*[3] To "punish" is to "impose a penalty

[2] Whether the petitioner was being "retried" for the Henry offense seems to be a matter of semantics. While the Government contends otherwise, certainly the introduction of the Henry evidence closely resembled being "retried" for that offense. The Government called a witness who accused the petitioner of committing the crime of robbery. The Government asked the jury to accept this evidence as true and to draw inferences of petitioner's guilt of bank robbery based in part on the Henry evidence.

[3] Though such "punishment" may also result from civil proceedings where the penalty is disproportionate to the alleged remedial purpose of the proceeding. *United States* v. *Halper, Id.*

upon some fault, offense, or violation." *Webster's Third New International Dictionary of the English Language Unabridged*, (8th Ed. 1966).

Petitioner suggests that constitutionally the introduction of the Henry evidence in this trial placed him at risk and therefore in jeopardy in regard to the Henry incident.[4] In effect, the defendant had to either once again establish innocence as to the Henry allegation or suffer the consequences that the jury would be allowed to infer petitioner's guilt in regard to the First Pennsylvania robbery because he had been in the Henry residence within a couple weeks of the bank robbery with a mask and a gun in the presence of Delroy Christian. Allowing the jury to draw such an inference from the Henry evidence amounts to the "imposition of a penalty" in reference to the Henry incident. The utilization of this evidence in such a manner in the second criminal trial is as punitive as attempting to impose a disproportionate civil penalty after a prior acquittal. See *United States* v. *Halper, supra*. Certainly, the use of the Henry evidence appears more punitive than remedial. This Court's double jeopardy jurisprudence establishes that any attempt to "punish" in a proceeding subsequent to an acquittal is constitutionally prohibited.[5]

3. The Government cites *Standefer* v. *United States*, 447 U.S. 10 (1980) to support its argument that "the differences between criminal and civil cases weigh in favor of a cautious application of collateral estoppel in the crimi-

[4] The risk to which the jeopardy provision of the double jeopardy clause refers "has long been construed to mean something far broader than its literal language." *Breed* v. *Jones*, 421 U.S. at 528.

[5] This result follows even though a lesser burden of proof may be applicable in the subsequent proceedings. *United States* v. *Halper, supra.*

nal context not a broader application." (Br. Resp. 25). The situation presented in *Standefer*, where this Court held the doctrine of non-mutual collateral estoppel inapplicable to criminal cases, is easily distinguished from that presented here in terms of the core values which double jeopardy protects. Thus, since the defendant in *Standefer* had not been a party in the prior trial he was not being forced to again defend an allegation for which he had been acquitted. It could not fairly be argued that the defendant there was subject to the "embarrassment, expense, and ordeal" associated with a retrial or subject to living in "a continuing state of anxiety and insecurity." See *Green* v. *United States*, 355 U.S. 184,187 (1957). The collateral estoppel concern with protecting litigants from the burden of relitigating issues with the same party was also inapplicable to *Standefer*.

The Government also quotes from *Standefer* to the effect that the public interest in criminal cases mandates "less concern for judicial economy" than that in the civil arena and "to plead crowded dockets as an excuse for *not trying* criminal defendants" is not in the best interest of the criminal justice system. 446 U.S. at 25. (Br. Resp. 26) (emphasis added). While judicial economy is not the linchpin of petitioner's argument and is only one of the many double jeopardy-collateral estoppel considerations present in this case, nevertheless petitioner would note that the public interest expressed by the Court in *Standefer* as weighing more heavily than judicial economy is not present in this case. Here, petitioner does not seek an order that he could not be tried for the bank robbery. Thus, unlike Standefer he does not seek immunity from prosecution; rather, he only seeks to exclude evidence,

citing judicial economy as one of many applicable policy considerations.[6]

II. The Government's Burden Of Proof Argument Fails To Give Adequate Consideration To The Concerns Present When The Second Proceeding Is Criminal.

1. In its response to the petition for writ of certiorari and in its brief on the merits, the Government emphasizes its burden-of-proof argument, contending that collateral estoppel is inapplicable since the burden the Government needed to carry to support admissibility of the Henry evidence in the bank robbery (preponderance) was less than the beyond a reasonable doubt burden which it shouldered in the Henry trial. In support of its argument, the Government cites decisions of this Court holding that an acquittal in a criminal case does not necessarily foreclose subsequent civil penalty or forfeiture proceedings based on the same conduct. The rationale of these cases was based, in part, on the lower standard of proof in the civil proceeding.

2. The Government relies heavily on this Court's decisions in *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984), *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), and *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), holding that an acquittal in a criminal case does not collaterally estop the Government from later bringing a civil forfeiture or penalty proceeding based on the same facts giving rise to the criminal prosecution. It is true that these decisions were based in part on the lesser burden of proof applica-

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[6] See also Federal Rule of Evidence 403, which provides that relevant evidence, may be excluded, inter alia, for "undue delay or "waste of time."

ble, but the language of the Court clearly indicated that its rulings in these cases could not be severed from the fact that it was considering a subsequent civil proceeding following the acquittal. Thus in *Eighty-Nine Firearms* the Court determined that "the time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." 104 S.Ct. 1099 (1984). In *One Lot Emerald Stones*, it was held that an acquittal "does not constitute an adjudication on the preponderance-of-the evidence burden applicable in civil proceedings." 409 U.S. at 235. See also *Helvering* v. *Mitchell*, 303 U.S. at 397 (acquittal "not a bar to a civil action by the Government remedial in its nature . . ."). These decisions do not sanction the Government's attempt to relitigate an acquitted a defendant's guilt in a subsequent criminal proceeding.

3. In his opening brief petitioner noted that resolution of this case on a strict burden-of-proof analysis would tend to unfairly deprive those innocent defendants who are acquitted of the protections afforded by double jeopardy and raise due process reliability concerns due to the increased risk of conviction based in part on conduct for which the defendant is not guilty. (Br.Pet. 38-39). The Government responds that since the jury is instructed that it must acquit if there is a reasonable doubt, it "is fair to assume that in practice juries rarely reach a collective determination that a defendant is entirely innocent of an offense." (Br. Resp. 16,n.7). The Government does not quarrel with petitioner's assumption that a significant number of acquitted defendants are innocent, but merely states that juries rarely reach such a "collective" conclusion. Whether the Government's observation is empirically correct is irrelevant as the same concerns are

present for the innocent defendant, namely the increased risk of erroneous conviction from having to redefend, whether or not the jury verdict represents a collective finding of innocence. This Court has often imposed a prophylactic rule excluding evidence across-the-board against all defendants in order to protect the rights of the unascertainable few who absent such a rule would be subject to a particular kind of prejudice. For instance, not all defendants are so susceptible to custodial pressure that they are unable to effectively exercise their right against self-incrimination without the assistance of an attorney, yet this Court ruled in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that in-custodial statements taken without giving the suspect the warnings mandated by that case would be excluded from evidence without any inquiry into the particular defendant's knowledge of the right or susceptibility to custodial pressures.[7]

III. The Admission Of Evidence Concerning Acts For Which A Defendant Has Been Tried And Acquitted Involves Considerations Not Present With Other Types Of Evidence.

1. The Government asks the Court to hold petitioner's prior acquittal meaningless in the context of the introduction of the Henry evidence. Thus, the only inquiry should be whether such evidence is relevant. If so, such evidence would be admissible unless it violated a "privilege or other legal right." (Br. Resp. 32). A contrary rule would have the undesirable effect of "establish[ing] a different standard of relevance for this evidence than for any other evidence." (Br. Resp. 18).

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[7] "The Fifth Amendment privilege is so fundamental we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U.S. at 468.

2. In support of its argument that such evidence should be admissible through a straight-forward application of the relevance provisions of the Federal Rules of Evidence, irrespective of the acquittal, the Government reminds the Court that these Rules "are congressionally mandated directions to the courts that specify the extent to which such evidence is or is not admissible . . ." (Br. Resp. 27). In addition to ignoring the fact that the Federal Rules of Evidence do not speak to the issue of how to treat evidence concerning conduct for which there has been an acquittal, this approach, more importantly, overlooks the basic premise that Congress has no authority to direct the admission of evidence obtained or sought to be admitted in violation of the Constitution of the United States.

3. Similarly, the Government argues that "if evidence meets the test of relevance, and if its admission would not violate a privilege or other legal right", such evidence should be admitted as safeguards exist to protect against prejudice. (Br. Resp. 28, 32). While perhaps true as a general proposition, as applied to this case this argument assumes its own conclusion, for if either the due process or double jeopardy clauses of the Fifth Amendment barred introduction of the Henry evidence then such obviously violates a "privilege or other legal right" in the same sense that otherwise relevant evidence obtained in violation of the Fourth, Fifth or Sixth Amendments is not admissible.

4. Finally, in this same vein, the Government argues that this Court's decision in *Huddleston* v. *United States*, 108 S.Ct. 1496 (1988) rejects the idea that the admission of "other acts" evidence should be justified by a special standard. (Br. Resp. 28). The reliance on *Huddleston* is misplaced as there the Court was not presented with the important concerns that are present when a defendant

has previously been acquitted of the "other acts". None of the usual protections cited in *Huddleston* against prejudice accorded a defendant by the Federal Rules of Evidence when "other acts" evidence is admitted, 108 S.Ct. at 1502, address the double jeopardy or due process concerns raised when a defendant is forced to defend a second time against allegations for which he has previously been tried and acquitted.

IV. The Admission Of The Testimony Of Vena Henry Did Not "Promote The Interest In Fair And Evenhanded Adjudication." (Br. Resp. 37).

1. The Government responds to petitioner's due process arguments by contending that the result sought by petitioner "would undercut, rather than advance, the reliability of fact-finding" (Br. Resp. 12), inconsistency in jury verdicts is a "fact of life" in the criminal justice system (Br. Resp. 34), and exclusion of evidence concerning an acquitted crime does not "occup[y] any place in the traditions of fairness that have grown up around a criminal trial." (Br. Resp. 37).

2. The Government's argument that exclusion of acquitted conduct evidence on due process grounds would "undercut" reliable fact-finding in those situations where a "careful review" of the record shows an acquittal on a ground other than that in issue ignores the fact that due to the numerous, often unarticulated, bases which may explain a jury's verdict, the reliability of attempting such a determination may itself be an unreliable procedure. Petitioner's proposed rule that such evidence would not be barred where examination of the record of the first trial shows petitioner or his agent made an admission of the fact sought to be proven by the disputed evidence draws an appropriate compromise between the reliability con-

cerns of the defendant in not having to defend against allegations of which he has been acquitted and those of the Government in not having evidence excluded which has no reasonable relationship to the fact of the acquittal. (Br. Pet. 23-24).

3. Contrary to the Government's suggestion, this Court has not always held that the ability to cross-examine and introduce "countervailing evidence" is sufficient to "resolve doubts about reliability" especially where other important policies must be weighed. (Br. Resp. 32). For instance, doubts concerning the reliability of an involuntary confession mandate the exclusion of such evidence even though the defendant could still cross-examine and introduce independent evidence in an attempt to establish the actual unreliability of the statement. See *Rogers* v. *Richmond*, 365 U.S. 534, 545 (1960). Here, the Government's repeated references to petitioner's ability to "submit countervailing evidence", "to argue against the inferences", "to challenge [the evidence] by any appropriate means" or to "show the evidence was either false or insignificant" (Br. Resp. 34-35), all ignore the reality that these aphorisms are simply shorthand for saying petitioner, though acquitted, must again defend the same allegations in a subsequent *criminal* trial.

4. In responding to petitioner's argument that the introduction of acquitted conduct evidence raises reliability concerns similar to those expressed by this Court's decisions in the counselless conviction cases, (Pet. Br. 18-19), the Government seeks to have the Court, in effect, adopt a rule that a conviction in a prior trial has legal significance in a latter trial while an acquittal does not. Thus, according to the Government's reasoning, the real distinction between the situation presented here and the counselless conviction cases is that in the latter the

conviction is "conclusive as to the fact of the conviction" while in the former the defendant has an "opportunity to prove that he did not commit the offense." (Br. Resp. 32). This purported distinction overlooks the very concerns present in the acquitted conduct situation, namely that the defendant not have to again redefend and thus face the hazards double jeopardy is designed to prevent. Like the defendant given an "opportunity" to convince the jury that his involuntary confession is indeed unreliable, it would be little solace to a defendant to know he will again be given an "opportunity" to defend.

V. The Admission Of The Henry Evidence Was Not Harmless Beyond A Reasonable Doubt.

1. In his opening brief, petitioner, while recognizing this Court's power to undertake the harmless error analysis of the record, suggested that if the Court determines that the admission of the Henry evidence was constitutional error, it may want to remand this case to the Court of Appeals for such determination. In light of this position petitioner did not address in detail the actual issue of whether the admission of the Henry evidence was harmless beyond a reasonable doubt as required by *Chapman* v. *California*, 386 U.S. 18 (1967).

In contending that any error in the admission of the Henry evidence would be harmless even under the *Chapman* standard, the Government relies on the identification of petitioner by three witnesses, Messer, Pichardo, and Rosario, coupled with circumstantial evidence that allegedly connected petitioner to the white Volkswagen seen in the town of Frederiksted shortly before the robbery of the First Pennsylvania Bank.

2. *Chapman* places the burden on the government to demonstrate beyond a reasonable doubt that the admis-

sion of the Vena Henry evidence was harmless. In making this determination the reviewing court should guard "against giving too much emphasis to 'overwhelming' evidence of guilt." *Harrington* v. *California*, 395 U.S. 250,254 (1969). For an error of constitutional magnitude to be declared harmless, it "must have made *no* contribution to a criminal conviction." Id. at 255 (J. Brennan, dissenting) (emphasis in original).

3. The Government lays great emphasis on the eyewitness identifications of Messer, Pichardo, and Rosario. However, as this Court has noted "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228 (1967). The circumstances surrounding both the initial observation of the robber by Messer, Pichardo, and Rosario and the events occurring at the time of the pretrial identification of the petitioner strongly counsel against summarily concluding that the evidence was "overwhelming" against petitioner.

4. The Government argues that Messer testified that he had a "clear recollection". Similarly, Pichardo told the jury that she "would never forget those looks".[8] Petitioner suggests that the focus in the harmless error analysis should be more on the circumstances surrounding the observations of the witnesses rather than on Messer and

[8] The Government also characterizes the identification of petitioner by Rosario, Pichardo's daughter, as "unequivocal". (Br. Resp. 42). Rosario merely identified petitioner when asked if she saw the individual who drove the van into her yard that morning in the courtroom. There is nothing in the record to support any conclusion as to Rosario's degree of certainty or confidence in this identification, as opposed to the testimony of Messer and Pichardo cited above. (Tr. 9-23&24: 15-16).

Pichardo's self-serving statements of infallibility. In *Neil* v. *Biggers*, 409 U.S. 188 (1972), this Court noted that one of the factors to be considered in evaluating the reliability of eyewitness identification evidence is the degree of confidence the witness expressed at any *pretrial* identification procedure involving the defendant. The degree of confidence expressed at the pretrial confrontation is a factor distinctly more important than that expressed at trial since "it is a matter of common experience that once a witness has picked out the accused at the line-up he is not likely to go back on his word later on." *United States* v. *Wade*, 388 U.S. at 229, quoting Williams & Hammelmann, *Identification Parades*, Part I, Crim. L. Rev. 479,482 (1963). Further, numerous studies have shown that there is little empirical correlation between the confidence expressed by an eyewitness in his or her identification and the accuracy of that identification. A. Yarmey, THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION, 150-151 (1979); Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, Journal of Law and Human Behavior, v.4, n.4, 261 (1980); Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?* Journal of Law and Human Behavior, v.4, n.4, 243 (1980).

5. Though offering differing explanations for their failures to identify petitioner when presented with various pretrial opportunities, nonetheless the fact remains each of the three eyewitnesses did in fact fail to make such identification when presented with the opportunity. All three witnesses failed to identify petitioner in a lineup held approximately 4 weeks after the robbery. (Tr. 9-22: 207-210,227-232 (Messer); Tr. 9-23: 254-256,265-269 (Pichardo); Tr. 9-23&24:13-15,25-31 (Rosario)). Messer

did not identify petitioner in the lineup because he was "frightened" and because of petitioner's "slick hair style and weight loss" (Tr. 9-22:231-22). Pichardo and Rosario also offered fright as their explanation for not picking petitioner in the lineup. Both Pichardo and her daughter testified that they were scared because they had seen a movie on television where one of the participants in a lineup had "jumped through the glass" and then shot the witnesses. (Tr. 9-22:254-55 (Pichardo); Tr. 9-23&24:14 (Rosario)).

Several factors detracted from these attempted explanations for the failure to identify petitioner in the lineup. Each of the witnesses admitted that there were several police officers in the lineup room in addition to an Assistant United States Attorney and attorney for petitioner. They were told that the lineup was done with a one-way mirror and thus presumably the participants therein could not view the witnesses. (Tr. 9-22:228-231, 265-269). The purported explanations based on fear dramatically contrasted with and were called into question by the testimony concerning their alleged responses during the encounter with the robber. Thus, Messer who was too "frightened" to identify the bank robber in the relative safety of the police station when flanked by several law enforcement officials, nonetheless, while unarmed, entered his vehicle and gave chase to the armed individual who he had just seen rob a bank and commandeer a taxi van by dragging its driver from the vehicle. (Tr. 9-22:186-196). Similarly, Pichardo, allegedly too afraid to make an identification because of the obviously fictionalized television movie, had had the nerve to holler "you son of a bitch" when the stranger in the taxi van drove into her yard.[9] (Tr. 9-22:242).

[9] In addition, Pichardo and Rosario's consistent explanation based on the television movie had the earmarks of collusion, most probably brought about by the mother-daughter relationship. This possibility was buttressed by their admission that Rosario had not identified petitioner in an earlier photospread because her mother had told her not to get involved. (Tr. 9-22:252; 9-23&24:13).

In addition to the lineup failures, both Pichardo and Rosario failed to identify petitioner in at least one photographic spread shown to them. (Tr. 9-22:252-254 (Pichardo); 9-23&24:12-13,25 (Rosario)). While both had explanations for not picking petitioner's picture ("not wanting to get involved"), nevertheless for purposes of harmless error analysis, as opposed to a sufficiency-of-the-evidence inquiry, their failures to identify petitioner when presented with earlier opportunities belie the Government's contention that the evidence should be characterized as "overwhelming" because of the eyewitness testimony.[10]

6. As this Court has recognized, "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial . . ." *United States* v. *Wade*, 388 U.S. at 229. "Any emotion, such as extreme fright, experienced by the witness during the criminal ordeal . . . ought to be weighed carefully." *United States* v. *Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977). "The identification of strangers is proverbially untrustworthy." Frankfurter, THE CASE OF

[10] In addition to the above the defense called John Chamble, the attorney who had been appointed to represent petitioner at the lineup conducted on August 12th. Chamble testified that contrary to the assertions of Messer, Pichardo, and Rosario, each appeared calm at the lineup and none either exhibited or expressed any fear or hesitancy. Chamble also testified that despite Pichardo's contrary assertions, she never placed her hands over her face during the lineup. (Tr. 9-23&24:142-149,152).

SACCO AND VANZETTI 309 (1927), quoted in *United States* v. *Wade*, 388 U.S. at 228.

These principles, as applied to the circumstances in this case, caution against placing undue reliance on the mere fact these witnesses identified petitioner in the courtroom. First, there was no indication that either Pichardo, Rosario, or Messer had ever seen petitioner prior to the day of the bank robbery. Messer, the only one of the three identification witnesses who had been at the bank, testified that when the masked robber ran out into the street he, Messer, was standing behind a pillar in front of a building on the other side of the street. From this location he saw the robber, still masked, commandeer the taxi van. While the robber was driving the van away Messer observed the robber removing the mask. The robber removed the mask only up to his forehead. While Messer testified that he was "looking for a feature or face or something like that," the fact remains that nowhere in Messer's testimony does he describe any particular facial feature of the person he observed. Messer admitted he was frightened during the incident. Finally, Messer indicates that he saw the robber removing the mask as the vehicle moved down the street for a period of time which he estimates as from *one to four seconds*. (Tr. 9-22:190-195,233).

Pichardo and Rosario's identifications are also based on less than ideal circumstances. Pichardo viewed the man who drove into her yard for about thirty seconds through a louvered window, where she sat sewing. She did not see the direction the man ran. (Tr. 9-22: 242,250,258-259, 271). Rosario, viewing the man from another room in the house as he stuck his head out of the van to see who called him a "son-of-a-bitch", estimated that she saw him for approximately 15 seconds. (Tr. 9-23&24:4-5). She also did

not see where the man went. (Tr. 9-23&24:6). These observations were apparently, like Messer's, made while the taxi van was moving, as it did not stop in the Pichardo yard. (Tr. 9-23&24:33).

7. Finally, the circumstantial evidence relied upon by the Government to corroborate the identification testimony is unsubstantial without the Henry evidence. The Government contends that even without this evidence, it was proven that petitioner had borrowed "*the* white Volkswagen" (emphasis added), that "it" was occupied by someone matching petitioner's description on the morning of the robbery, and that "it" was present in the vicinity of the bank near the time of the robbery. (Br. Resp. 43). A close review of the record indicates that the Government has overstated the evidence in this regard. Phillip Tutein, a friend of petitioner's, testified that Petitioner had borrowed Tutein's white Volkswagen on a day near the time of the robbery. "White Volkswagen" was the only description given. Tutein could not recall the license number of the vehicle, (Tr. 9-23&24:37-38), but Anthon Christian, a policeman, testified that he saw a white Volkswagen at approximately 9 a.m. stalled on the side of Mahogany Road.[11] Anthon Christian recorded the license number and forwarded it to Officer Zurita who was then led to Tutein. This, coupled with the general description given by Anthon Christian of one of the occupants of the vehicle, could reasonably have lead the jury to believe that the petitioner was in Tutein's white Volkswagen on Mahogany Road near the town of Frederiksted some five and one-half hours prior to the robbery. However, in the absence of the connection between Delroy Christian and petitioner,

[11] Mahogany Road is near the town of Frederiksted. (Tr. 9-23&24:54).

supplied by the Vena Henry evidence, there is no connection between the Tutein vehicle seen near Frederiksted five and one-half hours before the robbery and the white Volkswagen seen by Officer Anita Christian in the town of Frederiksted near the time of the robbery. Officer Anita Christian only described this vehicle as a "white Volkswagen." No license number was recorded and, without the Delroy Christian—petitioner connection, there is no evidence otherwise tying this vehicle to petitioner.

8. In this case there is additional objective evidence concerning the effect of the erroneously admitted Henry evidence. The petitioner's first trial for bank robbery without the Henry evidence resulted in a hung jury. The petitioner was convicted at a second trial, again without the Henry evidence. However, that conviction was reversed because of the strong possibility the jury was biased. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134 (3d Cir. 1987). Thus, in the only prior trial with an unbiased jury where the Henry evidence was not introduced, the jury was unable to reach a verdict as to petitioner's guilt.

9. Petitioner concedes that the evidence introduced by the Government was sufficient to withstand a sufficiency-of-the-evidence attack. However, decisions of this Court make it clear that the harmless error analysis is distinct from the sufficiency inquiry. See *United States* v. *Lane*, 106 S.Ct. 725 (1986); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). *Kotteakos* requires an "examination of the proceedings in their entirety." 328 U.S. at 762. Petitioner submits that when the evidence in this case is "examined in its entirety" the Government has been unable to sustain its burden of demonstrating that the

admission of the Vena Henry evidence was harmless beyond a reasonable doubt.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA,
AND GOVERNMENT OF THE VIRGIN ISLANDS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers throughout the 50 states. The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. A cornerstone

of this organization's objectives, and of the criminal justice system, is the Fifth Amendment prohibition against double jeopardy. The NACDL is very concerned about any decision which would undermine or restrict the scope of this constitutional guarantee, as would the adoption of the position taken by the respondents and the court below in the instant case.

The Amicus Curiae Committee of the NACDL has determined that the issues involved in this case are of such importance to criminal defense lawyers and their clients throughout the nation that the NACDL should offer its assistance to this Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Hon. William C. Bryson, Acting Solicitor

General of the United States, on behalf of respondents and Robert L. Tucker, Esq., Federal Public Defender for the District of the Virgin Islands, on behalf of petitioner. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The admission of evidence showing that a defendant has committed a crime of which he has been previously been acquitted violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

In Ashe v. Swenson, 397 U.S. 436 (1970), this Court first held that collateral estoppel in criminal cases was a constitutionally based doctrine rooted in the double jeopardy provisions of the Fifth Amendment. Ashe dealt with a situation in which a defendant was reindicted for a separate offense arising

out of the same factual situation which had resulted in the earlier charge of which he had been acquitted. However, the theory of Ashe is equally applicable where the government seeks to introduce evidence of prior acquitted conduct under Rule 404(b) of the Federal Rules of Evidence, other crimes evidence arising from a different factual setting from that of the offense being tried. In both situations, the defendant is being called upon to defend anew misconduct of which he has previously been put in jeopardy and acquitted. In both, he runs the risk that an adverse determination with respect to the acquitted conduct will result in his incarceration. And, in both, the government seeks an opportunity to relitigate issues which it has previously lost.

A review of the historical context in

which Ashe was decided shows that its principles should not be restricted in application. The development of double jeopardy and collateral estoppel jurisprudence since the beginning of the American republic has generally been one of expansion. Double jeopardy protection has been greatly expanded by this Court to maintain a balance between the resources of the government and defendants in the face of ever more complex prosecutions and greater prosecutorial discretion with respect to the framing of charges. Collateral estoppel has also, though more recently, been the subject of expansive development in response to the ever increasing work load of the courts and the consequent necessity of avoiding the relitigation of issues. The application of the principles of Ashe to cover situations such as that presented in the

instant case is logical and appropriate in this context.

The NACDL, whose members stand on the front lines of criminal defense, believes strongly that the Double Jeopardy Clause should be construed in the widest possible manner, particularly in the area of collateral estoppel. Where a defendant has been acquitted of a crime, the repose afforded by double jeopardy and collateral estoppel doctrines is one of the few protections the defendant has against excessive and, in some cases, even vindictive, reprosecution. In order to maintain the balance of power between the criminal defendant and the prosecutor which the framers of the Constitution understood to be essential, it is necessary, as prosecutorial power grows through the prol[illegible]eration of statutory offenses, to preserve the Double Jeopardy

Clause and collateral estoppel doctrine and to apply them in all situations in which they legitimately arise.

It is fundamentally unfair to expose a criminal defendant to charges of which he has been acquitted. Lacking resources comparable to those of the government, such a defendant is always handicapped when he must face the charges a second time. At the same time, allowing the government to relitigate issues it has lost demeans the value of a jury verdict and creates an incentive to wasteful and oppressive prosecutions.

The Third Circuit in the instant case undermined both the Double Jeopardy Clause and the constitutional doctrine of collateral estoppel enunciated in Ashe by holding that the erroneous admission of evidence of prior acquitted conduct under Rule 404(b) was not error of

constitutional magnitude. In applying a nonconstitutional harmless error standard instead of the "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18 (1987), the Third Circuit undermined important constitutional protections which this Court should restore.

ARGUMENT

I

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED WHEN EVIDENCE OF PETITIONER'S PRIOR ACQUITTED CONDUCT WAS INTRODUCED IN HIS SUBSEQUENT ROBBERY TRIAL

A. The Fifth Amendment Double Jeopardy Clause Has Been The Subject Of Generally Expanding Interpretation Since The Founding Of The United States

Although Ashe v. Swenson was a seminal decision in which this Court first held that collateral estoppel was a constitutionally based doctrine rooted in the Double Jeopardy Clause, it arose in

the context of generally expanding interpretations of the Double Jeopardy Clause and the collateral estoppel doctrine by American courts, since the founding of the Nation. A brief review of this history demonstrates that the principles of Ashe were developed as an appropriate, if not inevitable, response to the increasing complexity of modern criminal litigation and should not be limited in their application to the literal facts of Ashe itself.

The drafters of the United States Constitution provided in the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The principle, however, that a defendant could not be tried twice for the same criminal offense was not a new one at the time of the adoption of the Bill of Rights. Indeed,

it has been traced back to Greek, Roman and Canon law. See generally, J. Sigler, Double Jeopardy (1969), pp. 1-37; S. Schulhofer, "Jeopardy and Mistrials", 125 U. of Penn. L.Rev. 449, 452 (1977) ("Schulhofer"); Bartkus v. Illinois, 359 U.S. 121, 151-2 (1959) (Black, J. dissenting); Ex Parte Lange, 85 U.S. (18 Wall) 163, 166-173 (1873). Blackstone recognized the principle as a ". . . universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence." W. Blackstone, Commentaries on the Laws of England, Vol. 4, pp. 335-6 [Lewis ed. 1902].

At common law, the principle of double jeopardy was an extremely narrow and surprisingly harsh one. For example, a convicted person could not obtain a new trial through an appeal, since his success

on appeal would require that he submit to a second trial on the same offense. Green v. United States, 355 U.S. 184 (1957). Nevertheless, the framers of the Constitution believed that the principle was so critical to the administration of justice that it needed to be included in the Bill of Rights.

> "The need for the principle's general protection was undisputed, though its scope was not clearly defined. Fear of the power of the newly established Federal Government required 'an explicit avowal in [the Constitution] * * * of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law.' People v. Goodwin, 18 Johns., N.Y., 187, 202."

Id. at 201 (Frankfurter, J. dissenting).

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources

> and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 187-8. See also Note, "The Double Jeopardy Clause as a Bar to Reintroducing Evidence," 89 Yale L.J. 962, 963-4 (1980).

After the adoption of the Constitution, American jurisprudence began to define and expand on the protections provided by the Double Jeopardy Clause. For example, the courts repudiated the early common law view that a defendant could not obtain a new trial after a successful appeal. United States v. Ball, 163 U.S. 662 (1896); Lockhart v. Nelson, __ U.S. __, 109 S.Ct. 289 (1988); Green v. United States, supra, 202-204. Despite the "life

or limb" language of the Fifth Amendment, it was held to cover all crimes, Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873). Jeopardy, once thought to attach only after a verdict was rendered, was held to attach as soon as a judge began to hear evidence, Downum v. United States, 372 U.S. 734 (1963). See generally Schulhofer 452-457.

In the nineteenth century, the issue of double jeopardy came up in relatively simple contexts. The prevailing theory of prosecution, apparently going back as far as the middle ages, was to charge an entire criminal transaction in a single count. See generally Note, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee," 65 Yale L.J. 339, 341-2 (1956). Accordingly, it was generally a straight forward task to determine whether

an individual had been prosecuted for the same offense previously. Later in the nineteenth century, however, prosecutors began to split charges into separate counts in which a single transaction might generate a number of different charges. In this context, the acquittal of a defendant on some charges and his retrial on other charges began to present questions of double jeopardy in more complex settings. It is at this point that the doctrines of res judicata and collateral estoppel find increasing expression in the criminal jurisprudence of this Court.

In United States v. Oppenheimer, 242 U.S. 85 (1916), Mr. Justice Holmes seemed comfortable with the notion that collateral estoppel applied in criminal cases even where reprosecution was not absolutely barred.

> "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." Id. at 87.

In Frank v. Mangum, 237 U.S. 309 (1915), the Court stated:

> "* * * a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction." Id. at 334.

Mr. Justice Brandeis referred to the concept of res judicata as a "fundamental principle" of criminal cases in Collins v. Loisel, 262 U.S. 426, 430 (1923). Again, in United States v. Adams, 281 U.S. 202 (1930), the Court noted that a criminal judgment was "conclusive on all that it decided." Id. at 205. And, in Sealfon v.

United States, 332 U.S. 575, 578 (1948), the Court held that the doctrine of collateral estoppel "operates to conclude those matters in issue which the verdict determined though the offenses be different." For an early discussion of these cases, see W. McLaren, "the Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," 10 Wash. L. Rev. 198 (1935).

B. The Complexity Of Modern Litigation And The Increasing Workload Of American Courts Has Resulted In Dramatic Expansion Of The Doctrine Of Collateral Estoppel

Along with the increasing interest in the application of the doctrines of res judicata and collateral estoppel in criminal cases, there was a dramatic expansion of those principles in civil litigation.

As has been demonstrated by Professor Vestal, the Ashe decision came down at

exactly the point when this Court and other courts in the United States were placing increasing reliance on principles of res judicata and collateral estoppel as a way of reducing the amount of civil litigation in the courts. A. Vestal, "Issue Preclusion and Criminal Prosecutions," 65 Iowa L. Rev. 281, 285-7 (1980). For example, this Court eliminated the old doctrine of mutuality of estoppel, requiring both plaintiff and defendant to have been bound by a previous judgment in order for collateral estoppel to apply. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). In Montana v. United States, 440 U.S. 147 (1979), the Court used the doctrines of collateral estoppel and res judicata against the United States even though it was not a

party in a previous lawsuit because of its active role as a "participating nonparty" in such action.

Thus, the "marriage" of double jeopardy and collateral estoppel in Ashe was an almost inevitable consequence of the expansion of both doctrines in response to the development of complex modern litigation in which the opportunity for, and danger of, relitigation of crimes was far greater than was known in the 18th and 19th centuries.

C. Ashe v. Swenson

Overruling its prior decision in Palko v. Connecticut, 302 U.S. 319 (1937), this Court first held that the Double Jeopardy Clause was a fundamental constitutional right binding on the states in Benton v. Maryland, 395 U.S. 784 (1969). A year later, in Ashe v. Swenson, 397 U.S. 436 (1970), the Court focused on the

constitutional implications of the doctrine of collateral estoppel, its relationship to double jeopardy and the method by which courts ought to apply the doctrine of collateral estoppel in the context of successive criminal prosecutions. These issues had been previously avoided in Hoag v. State of New Jersey, 356 U.S. 464 (1958), a case factually almost indistinguishable from Ashe.

The facts of Ashe are instructive. In Ashe, a habeas corpus proceeding, the defendant sought to overturn his conviction for robbery. The evidence in his first trial had shcwn that three or four armed men robbed six poker players in the home of one of the victims. The defendant was charged in separate counts with robbery of each of the six poker players; however, he was initially tried

on only one count. The jury returned a verdict of acquittal, evidently finding that the identification of the defendant was unreliable. The state then proceeded to prosecute the defendant for having robbed a second poker player. This time, the witnesses, having had their recollections refreshed, were substantially more positive of the identification of the defendant. He was convicted.

In Ashe, the Court held that the conviction violated the Double Jeopardy Clause of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, because the state had procured the conviction by relitigating the basic facts of the robbery on which it had originally lost.

> "The ultimate question to be determined, then, in the light of Benton v. Maryland, supra, is whether this

> established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. Green v. United States, 355 U.S. 184, 190." Id. at 445.

The Court elaborated on the manner in which the collateral estoppel doctrine should be applied:

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational

jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' Sealfon v. United States, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." Id. at 443-4.

D. The Constitutional Doctrine Of Collateral Estoppel Established in Ashe Should Be Applied Whenever The Government Seeks To Introduce Evidence Of Prior Acquitted Conduct In Subsequent Criminal Trials

In the aftermath of Ashe, this Court has not addressed the issue of whether the principles of Ashe can be applied to preclude the introduction of evidence of acquitted conduct in prosecutions which arise from different factual scenarios.

The Court has determined that a criminal acquittal does not collaterally estop the government from litigating the same issues in a civil case, One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). And, the Court has determined that Ashe does not prohibit the conviction of an individual for aiding and abetting even though the principal has been acquitted, Standefer v. United States, 447 U.S. 10 (1980). But, it has not dealt with the issue raised in this case of whether evidence of prior acquitted conduct can be constitutionally introduced as Rule 404(b) evidence in a subsequent criminal case involving unrelated charges.

Most of the Circuits have taken the position that a prior acquittal can foreclose the government in one way or

another from introducing evidence of facts that were determined in the previous trial. United States v. Gonzalez-Sanchez, 825 F.2d 572, 584 (1st Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 510 (1987); United States v. Jackson, 778 F.2d 933 (2d Cir. 1985), cert. denied, 479 U.S. 910 (1986); United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. Keller, 624 F.2d 1154 (3rd Cir. 1980); DeLaRosa v. Lynaugh, 817 F.2d 259 (5th Cir. 1987); United States v. Mock, 604 F.2d 341 (5th Cir. 1979); Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972); Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1987); United States v. Johnson, 697 F.2d 735 (6th Cir. 1983); United States v. Gornto, 792 F.2d 1028 (11th Cir. 1986); Albert v Montgomery, 732 F.2d 865 (11th Cir. 1984); United States

v. Mulherin, 710 F.2d 731 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); United States v. Day, 591 F.2d 861 (D.C. Cir. 1978).

Of these Circuits, the First, Second, Fifth, Eleventh and the D.C. Circuits take the position that double jeopardy clause precludes the introduction of such evidence. The Third Circuit and the Sixth Circuit have not adopted the view that collateral estoppel, as applied to subsequent unrelated prosecutions, is a constitutional doctrine. In this sense, they have limited Ashe to its general fact pattern. United States v. Dowling, 855 F.2d 114, 122-4 (3rd Cir. 1988); United States v. Johnson, supra; but see Rice v. Marshall, supra; see also Oliphante v. Koehler, 594 F.2d 547 (6th Cir. 1979).

While acknowledging the principles of Ashe, the Seventh and Eighth Circuits have

severely, and we believe unfairly, limited their application United States v. Gentile, 816 F.2d 1157 (7th Cir. 1987); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986), cert. denied, __ U.S. __, 107 S.Ct. 3270 (1987); Flittie v. Solem, 775 F.2d 933 (8th Cir. 1985); but see United States v. Castro, 629 F.2d 456, 465 (7th Cir. 1980); United States v. Brown, 547 F.2d 438, 443 (8th Cir.), cert. denied, 430 U.S. 937 (1977).

Finally, cases in the Eighth, Ninth and Tenth Circuits have taken the position that a prior acquittal is simply no bar to the introduction of evidence of acquitted conduct in a subsequent criminal trial, United States v. Riley, 684 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); United States v. Rocha, 553 F.2d 615 (9th Cir. 1977); United States v. Castro-Castro, 464 F.2d 336 (9th Cir.

1972), cert. denied, 410 U.S. 916 (1973); United States v. Van Cleave, 599 F.2d 954 10th Cir. (1979); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969). However, these latter opinions do not really discuss the double jeopardy issue and cannot be seen as very persuasive authority.

Leading cases in the Second and Fifth Circuits have addressed the issue of whether collateral estoppel can be applied in cases, such as the instant case, in which evidence of prior acquitted conduct is introduced in subsequent and substantially unrelated prosecutions. These Circuits have applied it without hesitation:

The Fifth Circuit observed:

> "We do not perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again

> subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial."

Wingate v. Wainwright, 464 F.2d 209, 213-14 (5th Cir. 1972).

The same court went on to conclude:

> "It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from

> the blight and suspicious aura which surround an accusation that he is guilty of a specific crime."

Id. at 215.

In a similar fashion, Judge Friendly in the Second Circuit had written even before Ashe:

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue . . . The Government is free, within the limits set by the Fifth Amendment . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

United States v. Kramer, 289 F.2d 909, 915-916 (2d Cir. 1961); accord, United

States v. Gonzalez-Sanchez, supra; United States v. Mock, supra; Albert v. Montgomery, supra; United States v. Day, supra.

Although Ashe dealt with a situation in which the defendant was accused in a second prosecution which grew out of the same core of facts that had previously resulted in an acquittal, there is nothing about the reasoning of Ashe and its emphasis on collateral estoppel as a doctrine grounded in the Double Jeopardy Clause that prevents its application to any situation in which a defendant has been acquitted of criminal charges and must relitigate the incident in a second criminal trial. Indeed, the strong policies underlying the Double Jeopardy Clause and the collateral estoppel doctrine, as they have evolved over time, favor this particular application of Ashe.

Where a defendant faces evidence of an extrinsic crime, the fact that he is on trial for a different offense arising from a different set of facts does not change the reality that he is being called upon to relitigate the first offense and his participation in that offense at the peril of his incarceration. He is forced to "run the gantlet" again in a criminal trial. In this connection, United States v. One Assortment of 89 Firearms, supra, One Lot Emerald Cut Stones v. United States, supra, and Helvering v. Mitchell, 303 U.S. 391 (1938) are distinguishable because they only dealt with the ability of the government to relitigate prior acquitted conduct in a subsequent civil case. Chief Judge Kaufman noted this critical distinction in United States v. Mespoulede, supra, at 335:

> "This is not a situation in which the second suit is

> civil in nature, where the defendant faces sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges. Here. . . [the defendant] is once again faced with criminal sanctions that, realistically, may be imposed in large part because the second jury is persuaded. . . [of the acquitted conduct]."

The contention that a defendant is not forced to face a criminal prosecution for the first offense when all that is done is to introduce evidence of his participation in the first offense as a method of assisting the trier of fact in deciding his involvement in a second offense is simply without merit. It ignores the reality, long recognized by American courts, that triers of fact tend to give evidence of extrinsic misconduct "excessive weight," and to punish such uncharged misconduct. J.H. Wigmore, Treatise on the Anglo-American System of

Evidence, [2d ed. 1923] ("Wigmore"), §194; Michelson v. United States, 335 U .S. 469, 475-6 (1948).

Allowing the government, in effect, to retry the defendant for conduct for which he has been previously acquitted by using evidence of the acquitted conduct in a second trial on unrelated charges upsets the balance of power struck by the Double Jeopardy Clause. It strongly favors the government at the expense of the defendant. The defendant and his counsel must cope with defending multiple offenses in multiple factual settings and frequently lack sufficient notice and resources to do so. Counsel to the unsuccessful petitioner in Hoag subsequently wrote about this drain on resources in even the more limited context of successive prosecutions arising out of a single criminal transaction:

> "A prosecutor, by carving up what is essentially one criminal transaction into a great number of offenses, may prosecute a person until the statute of limitations has run its course. This is true even though each trial may result in an acquittal and the only reason for the cumulative prosecutions is the prosecutor's subjective evaluation of the guilt of the individual. This possibility leaves the door open to vexatious litigation with its consequential nervous strain upon the mind and body of the individual as well as the inevitable drain upon his finances."

R. Knowlton, "Criminal Law and Procedure," 11 Rutgers L. Rev. 94 (1957); see also D. Magers and F. Yarborough, "Bis Vexari," 74 Harv.L.Rev. 1, 32 (1960).

The unfairness of permitting use of evidence of prior acquitted conduct is compounded by the fact that, although the proliferation of statutory offenses has widened prosecutorial discretion in selecting charges, relatively little

information is available to the accused in the federal criminal system about these charges prior to trial. Drug conspiracies, for example, do not require the specification or proof of an overt act; and, therefore, the indictments charging such crimes often provide little notice of an intention to utilize prior acts. 21 U.S.C. Sec. 846; United States v. Lee, 622 F.2d 787,790, reh. denied, 633 F. 2d 582 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981); United States v. Savaiano, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, __ U.S. __, 109 S. Ct. 99 (1988). And, the conspiracies themselves are often so lengthy and intricate that they may with little notice be construed at trial to encompass prior acquitted conduct. To a great extent, the same is true of RICO conspiracies, an increasingly popular weapon in the expanding statutory

arsenal of federal prosecutors. 18 U.S.C. §§1951 et seq.

Bills of particulars under Rule 7(f) of the Federal Rules of Criminal Procedure do not remedy these problems of notice. They are discretionary and, in our experience, disfavored by the District Courts.

In its brief on the question of whether the Court should grant a writ of certiorari in this case, the government states that "[e]vidence offered under Fed.R.Evid. 404(b) is often helpful to fact finders in criminal cases." (Br. Resp. 11). This argument, however, most respectfully, misses the point. Evidence of prior misconduct tends to be "helpful" because it tends to relieve the jury to some degree of responsibility for judging whether a defendant is guilty of the crime for which he is under indictment and for which he is being tried. As Professor

Wigmore put it:

> "It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much." Wigmore, §194.

Nor have American courts historically looked with favor on evidence of prior acts of misconduct. Unlike their continental counterparts, British and American courts have generally looked with disfavor on this evidence. Id.; Michelson v. United States, supra, at 475-6. Rule 404(b), it should be noted, is itself a general rule of exclusion rather than inclusion in this regard.

In the instant case, petitioner was acquitted of robbing Vena Henry. Subsequently, he was tried three times, on the present charges, the last trial resulting in the instant conviction.

Petitioner's ordeal was almost interminable; the result was virtually inevitable.

The evidence in the case does not appear to have been very strong. In the first of those three trials, the jury was hung, evidently unpersuaded by the identification evidence. As the Third Circuit explained, 855 F.2d 116-118, all three major identification witnesses were seriously impeached by prior failed identifications.

In this context, calling upon petitioner to defend once again his participation in the Vena Henry robbery in his last trial was necessarily a devastating blow to the defense of a close case. It gave the prosecution an unfair advantage against a beleaguered defendant who had been acquitted and against whom the evidence was not great. Petitioner had "run the

gantlet" on the Henry offense; his ordeal should have been concluded.

E. The Burden Of Proof For Introduction Of Evidence Under Rule 404 (b) Does Not Mandate A Different Result

The principal argument which tends to be made against applying the principles of Ashe to situations such as that presented in the instant case is that preclusive effect can only be given to facts which are determined on the same standard of proof. Thus, it is argued, that an acquittal in a prior criminal case only determines that the government failed to prove the case beyond a reasonable doubt. In contrast, evidence of acts of extrinsic misconduct can generally be introduced if the trial court ". . . examines all the evidence in the case and decides. . . [that] the jury could find the conditional fact. . . by a preponderance of evidence." Huddleston v. United States, ___ U.S. ___,

108 S.Ct. 1496, 1501 (1988). This argument, however, is artificial and incorrect. Citing United States v. Kramer, supra, this Court stated in Ashe:

> "'[it] is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case, . . . because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.' United States v. Kramer, 289 F.2d 909, 913." Id. at 443.

The existence of a lower threshold standard for the admission of evidence under Rule 404(b) only aggravates the double jeopardy problem. Not only must the defendant run the gantlet a second time, he must do so in a forum in which he runs an appreciable risk of being incarcerated on a quality and quantity of evidence that would normally be insufficient to convict

him.

A rule of evidence cannot override a constitutional provision such as the Double Jeopardy Clause cf. Sutherland Statutory Construction, §2.03 [4th ed.]. Indeed, Rule 404(b) does not, and was not intended to, deal with the question presented in the instant case. Nor is there anything in the Double Jeopardy Clause of the Fifth Amendment which authorizes the de facto retrial of a defendant in a subsequent prosecution for a crime of which he has been previously acquitted regardless of modern rules of evidence unknown at the time of the adoption of the Bill of Rights.

The fact that Rule 404(b) permits the admission of evidence, does not, under the Federal Rules of Evidence, end the inquiry as to its admissibility. It may be barred by other rules of evidence or doctrines

such as collateral estoppel. Indeed, this Court could easily hold that Rule 403 always precludes the introduction of evidence of acquitted conduct because of the confusion and prejudice to a defendant which always exists when the government asks a jury to conclude that a defendant is guilty of an offense of which he has previously been acquitted.

Finally, the conservative constructional approach found in Huddleston v. United States, __ U.S. __, 108 S. Ct. 1496 (1988) does not support the argument. In Huddleston, this Court declined to engraft on to Rule 404(b) the requirement of a preliminary judicial ruling that a defendant has committed prior bad acts by a preponderance of evidence. It did so primarily because the Rule itself contained no such requirement. Equally inappropriate would be an effort to

engraft onto Rule 404(b) some implicit authorization or mandate to admit evidence of prior acquitted conduct which would otherwise be barred by double jeopardy or collateral estoppel, when no such mandate is set forth in the Rule.

II

THE THIRD CIRCUIT ERRONEOUSLY FAILED TO APPLY THE CONSTITUTIONAL HARMLESS ERROR STANDARD

The Third Circuit determined that the introduction of the evidence concerning petitioner's prior involvement in an unrelated robbery was erroneous under Rule 404(b). It declined, however, to reverse the conviction because it determined that the error was nonconstitutional in nature and that the error did not have a "high probability" of having prejudiced the petitioner. 855 F.2d at 124. Had it applied the "harmless beyond a reasonable doubt" standard articulated by Chapman v.

California, 386 U.S. 18 (1987), the result would have been the reversal of petitioner's conviction. For, had a constitutional standard been applied, affirmance would have required that the Circuit Court be ". . . satisfied 'beyond a reasonable doubt', that the evidence had no possible effect on the verdict." United States v. Gonzalez-Sanchez, supra at 584. Such satisfaction could not have been achieved given the fact that the Third Circuit was unable to ". . . entirely discount the possibility that there may have been some prejudice to Dowling by the introduction of Henry's testimony. . ." 855 F.2d 124.

As demonstrated above, the error here was of constitutional magnitude because it involved a violation of petitioner's rights under the Fifth Amendment to the United States Constitution. Accordingly,

the determination of the Third Circuit must be reversed.

CONCLUSION

No practitioner of criminal law, whether prosecutor or defense counsel, can fail to appreciate the devastating effect of evidence of prior offenses. The mere suggestion of prior misconduct completely changes the dimensions of the trial. Where an individual has been acquitted of misconduct, it is singularly unfair to make him revisit the prior allegations at the peril of incarceration. To do so demeans the value of a jury verdict and undermines the integrity of the criminal system as a method for resolving some of the most important disputes which we face. And, it is an incentive for the unsuccessful prosecutor to overturn a jury verdict by inventively integrating evidence the first crime into the trial of

a second charge.

In the federal system, as the Court is well aware, almost all defendants are convicted. The number of cases in which the government will be defeated at trial because it is precluded from using evidence of prior acquitted conduct will be insignificant. Given the powerful policy considerations which clearly justify continued strengthening the Double Jeopardy Clause and its application to cases beyond the literal facts of Ashe, the Court should rule in favor of the petitioner in this cause.

Based upon the foregoing authorities, the decision of the Third Circuit should be reversed on the ground that the error which it found was of constitutional dimension and could not be said to have

been harmless beyond a reasonable doubt.

Respectfully submitted,

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